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Understanding the Unrest of France's Younger Workers: The Price of American Ambivalence

Joseph Seiner

UNDERSTANDING THE UNREST OF FRANCE'S YOUNGER WORKERS: The Price of American Ambivalence

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The youth of France refer to themselves as the "throwaway generation," in part because they perceive that their value to the labor market is simply disregarded by the government. Against this backdrop, young French workers recently took to the streets in riot to protest a newly enacted employment law that stripped employees under the age of twenty-six of many of their employment protections. The protests persisted after the French Constitutional Council held that the law did not violate France's constitution. The continued violent opposition ultimately forced French President Jacques Chirac to abandon the law, resulting in an embarrassing defeat for the government. Through unified action, French students, accompanied by union support, had forced the government to back away from a law that the youth perceived would limit their employment rights.

In the United States, Congress has passed similar legislation affording greater employment protections to older workers. The U.S. Supreme Court has also recently acted in *General Dynamics Land Systems, Inc. v. Cline*,[1] to make clear that protection from age discrimination in employment was intended for older, rather than younger, employees. Even more recently, in *Smith v. City of Jackson*,[2] the Court further restricted the employment protections of *all* employees on the basis of age. In response to this legislation and these Court decisions limiting their employment rights, however, American youth have remained silent—their complacency standing in stark contrast to the reaction of French youth. By failing to act,

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1. 540 U.S. 581 (2004).
2. 544 U.S. 228 (2005).

young American workers have permitted the erosion of their employment rights.

This article examines the structure and social context of employment law in France and the United States in an effort to explain the disparate reaction of the youth to similar labor laws and court decisions. The article provides a detailed analysis of relevant age-related legislation in each country, and examines the reasoning behind the recent French Constitutional Council and U.S. Supreme Court decisions. The article concludes that the different reactions of youth in France and the United States can be explained by three factors: (1) the varying unemployment rates between the two countries; (2) the different role that unions play in France and the United States; and (3) the fact that the French government, as opposed to the United States government, has a recent history of acquiescing to the demands of youth. The article proposes that by finding a collective voice, American youth—through peaceful means—can act to ensure that their employment protections are not limited any further. Ambivalence is simply not an answer.

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> *France was racked by strikes and demonstrations that turned violent on Tuesday, the latest act in a nationwide political and social drama aimed at forcing the government to rescind a new youth labor law.*
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> *The worst violence occurred in the heart of Paris, as the demonstrations were winding down and groups of youths confronted the riot police. One police officer was reported seriously injured when a large firecracker thrown by protesters exploded in his face. The police eventually turned to tear gas and water cannons to clear the protesters away.*[3]

I. INTRODUCTION

The "Kleenex generation."[4] This is how French youth perceive their role in society because they believe that their talents are "used and tossed aside."[5] In the spring of 2006, the frustrations of this generation spilled over into a series of violent protests that will forever change the social structure of France.

On March 28, 2006, an estimated 2.7 million protesters took to the streets of France to challenge a recently enacted employment law that permitted the discharge of employees under the age of twenty-six without cause if the termination occurred within two years of the worker's start

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3. Elaine Sciolino & Craig S. Smith, *Protests in France over Youth Labor Law Turn Violent*, N.Y. TIMES, Mar. 29, 2006, at A12.

4. *See, e.g.*, Brian Duffy, *Is Paris Burning? Yep—for All the Wrong Reasons*, U.S. NEWS & WORLD REP., Apr. 3, 2006, at 14.

5. *Id.*

date.[6] The protests turned intense, as many youths hurled rocks and bottles at police, who responded by charging the more aggressive groups.[7] The demonstrations widely interfered with France's transit operations, causing disruptions to air, bus, and train travel across the country.[8] The strikers also caused the shut down of the Eiffel Tower and Paris Opera.[9] The riots sent shockwaves throughout the French government, as legislators from many parties "warned that the size of the protests signaled a threat to the future of the government."[10] Two days later, in a historic decision, the French Constitutional Council upheld the constitutionality of the newly enacted law.[11] The Council determined that it would not second guess Parliament on the terms of the law, which, on its face, had the goal of attempting to help younger workers secure employment.[12] The decision further embroiled the tensions between French youth and the government, as widespread protests continued.[13]

One day after the Constitutional Council's ruling, French President Jacques Chirac attempted to compromise with the protesters, promising to limit the "trial period" in the law to one year and require that discharged employees be given the reason for their termination.[14] The compromise offer was met with renewed protests as "several thousand young people" took to the streets and were confronted by police who resorted to using tear gas.[15] On April 2, 2006, Chirac signed the so-called "first job contract" into law.[16] France's union syndicates responded immediately by planning more demonstrations.[17] Finally, on April 10, 2006, Chirac announced that the labor law would be rescinded, a move that "was a humiliating political

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6. Molly Moore, *Huge Protest Puts France to the Test*, WASH. POST, Mar. 29, 2006, at A13; Sciolino & Smith, *supra* note 3.

7. Sciolino & Smith, *supra* note 3.

8. Moore, *supra* note 6. "An estimated one-third of all flights to and from Paris airports were canceled and most others were delayed . . . ." *Id.*

9. *Id.*

10. *Id.*

11. CC decision no. 2006-535DC, Mar. 30, 2006, http://www.conseil-constitutionnel.fr/decision/2006/2006535/2006535dc.pdf; *see also* Molly Moore, *Protesters Urge Chirac to Relent on Jobs Law*, WASH. POST, Mar. 30, 2006.

12. *See infra* Part III (discussing the Constitutional Council's decision upholding the constitutionality of the youth employment law).

13. *See* Craig S. Smith, *French Law Is Affirmed as Protests Snarl Traffic*, N.Y. TIMES, Mar. 31, 2006, at A4.

14. Craig S. Smith, *Chirac Offers Labor Law Compromise; Protesters Reject It*, N.Y. TIMES, Apr. 1, 2006, at A3.

15. *Id.*

16. Craig S. Smith, *Chirac Signs Jobs Bill; More Protests Are Planned*, N.Y. TIMES, Apr. 3, 2006, at A8.

17. *Id.*

defeat" for Chirac and Prime Minister Dominique de Villepin.[18] Villepin, who drafted the law and who is a presidential hopeful in the country's upcoming elections, may have seen his political hopes "crippled and possibly killed" by the protests and the government's willingness to bow to the youth groups.[19] The irony of Chirac and Villepin's political debacle is that the law was actually designed to help cure the prevalent problem of high unemployment among French youth, which stands at about twenty-two percent.[20] The belief was that the law would give employers increased flexibility in handling its younger employees and therefore lead to an increased desire to hire these younger workers.[21] Obviously, the French youth did not see the benefit in this law, viewing it simply as a way to strip them of their employment protections.[22] In its place, Chirac has introduced a less sweeping proposal, offering "financial incentives" to employers for hiring and training younger employees, and providing assistance to youth in finding jobs and internships.[23]

In the United States, it is hard to imagine a labor law in recent times that has generated such widespread debate and violence. Indeed, one would likely have to go back to the civil rights movement of the early sixties to find an example that would rival the recent French debate. In response to oppression and lack of opportunities, there was large-scale rioting in the

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18. Elaine Sciolino, *Chirac Will Rescind Labor Law that Caused Wide French Riots*, N.Y. TIMES, Apr. 11, 2006, at A1. Chirac's weakened position in implementing employment policies is further demonstrated by his recent attempt to persuade French employees to work during a traditional holiday to raise money for older persons and the disabled. *See* Colin Randall, *French Stay Home to Snub Chirac's "Day of Solidarity,"* DAILY TELEGRAPH (London), June 6, 2006, at 16. Over half of the workers in the country stayed home during Whit Monday, rejecting the government's attempt to abolish the holiday. *Id.*

19. Molly Moore, *Protests Force French Premier to Dump Youth Jobs Law: Villepin Championed Measure that "Was Not Understood,"* WASH. POST, Apr. 11, 2006, at A14; *see also* Alessandra Galloni, *Split Vote, Protests Reveal Discontent in Europe; Bowing to Popular Pressure, French President Abandons a New Youth-Labor Law*, WALL ST. J., Apr. 11, 2006, at A3. Indeed, a poll taken in March 2006, placed Villepin's approval rating at twenty-nine percent. *See* Smith, *supra* note 13.

20. *See* Galloni, *supra* note 19; *see also* Andrew Higgins, *Liberte, Precarite: Labor Law Ignites Anxiety in France*, WALL ST. J., Mar. 29, 2006, at A1 ("The uproar began as a protest against a new law designed to relax a rigid French labor market that makes it difficult to fire anyone.").

21. *See* Moore, *supra* note 19 ("This deregulation would help prime the economy and ultimately expand the job market, proponents argued.").

22. *See* Smith, *supra* note 14 ("The effort [to reduce youth unemployment] was lost on university students, who saw the law as an invitation for employers to further exploit the country's job-hungry young people.").

23. *See* Sciolino, *supra* note 18.

early sixties by blacks in the streets of many American cities.[24] The demonstrations often turned bloody and resulted in the burning and looting of white-owned establishments.[25] One of the positive results to arise from the rioting was the passage of the Civil Rights Act of 1964, which gave protections to all American workers from discrimination on the basis of race and color.[26]

In recent times, there have been no similar widespread protests in the United States by American youth. Like their French counterparts, young American workers have watched as greater protections have been given to older workers. Indeed, the passage of age legislation and two recent Supreme Court decisions highlight the erosion of the rights of younger workers in this country. When it passed the Age Discrimination in Employment Act of 1967,[27] Congress contemplated extending employment protections to younger workers, but decided against protecting this group as it would undermine the "major objective of the bill."[28] More recently, in *General Dynamics Land Systems, Inc. v. Cline*,[29] the U.S. Supreme Court made clear that protection from age discrimination in employment was

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24. *See* Paul Frymer & John D. Skrentny, *The Rise of Instrumental Affirmative Action: Law and the New Significance of Race in America*, 36 CONN. L. REV. 677, 689 (2004) (acknowledging the violence that occurred during the civil rights movement and noting that some protests would result in "huge, bloody riots, most often in black neighborhoods," as protesters "burned and looted stores owned by whites and fought with local police").

25. *Id.* It was often unclear who led or participated in these riots, as black leaders clearly opposed them. *See, e.g.*, Teresa M. Bruce, Note, *Neither Liberty nor Justice: Anti-Gay Initiatives, Political Participation, and the Rule of Law*, 5 CORNELL J.L. & PUB. POL'Y 431, 432 (1996) ("Martin Luther King preached nonviolent opposition to the racist power structure and led civil rights marches to protest the inequality between black and white Americans." (quoting Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 VA. L. REV. 1551, 1580 (1993))). Even the black protesters themselves were not safe from violence, and were attacked by those with opposing views. *See* Lincoln L. Davies, *Lessons for an Endangered Movement: What a Historical Juxtaposition of the Legal Response to Civil Rights and Environmentalism Has to Teach Environmentalists Today*, 31 ENVTL. L. 229, 323 (2001) (discussing "white backlash" of civil rights movement and noting that "[d]uring a march through an all-white neighborhood in Chicago, a group led by Jesse Jackson was attacked by a mob carrying signs of 'White Power'").

26. 42 U.S.C. § 2000e-2(a) (2000) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."); *see* Emmanuel O. Iheukwumere & Philip C. Aka, *Title VII, Affirmative Action, and the March Toward Color-Blind Jurisprudence*, 11 TEMP. POL. & CIV. RTS. L. REV. 1, 21 (2001) ("[T]he violent response that followed a peaceful civil rights demonstration . . . may have . . . convinced President Kennedy to implore Congress to pass a comprehensive civil rights legislation.").

27. 29 U.S.C. §§ 621–634 (2000).

28. H.R. REP. NO. 90-805, at 7 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2213, 2219.

29. 540 U.S. 581 (2004).

intended for older, rather than younger, employees.[30] And, subsequent to *Cline*, the Supreme Court has acted to further restrict the employment protections of *all* employees on the basis of age.[31]

What has been the reaction of American youth to Supreme Court decisions restricting their rights and legislation granting far greater protections to older workers? Ambivalence. While their French counterparts were active in pressing their unions to fight legislation that stripped them of their rights, American youth have not attempted any similar protest of age-related laws or decisions. While it is unclear whether active opposition would have had any effect on the law, one thing is certain—continued passivity by American youth will lead to further employment rights being stripped away from this group. While violence and rioting are certainly not the answers, peaceful opposition to existing and proposed legislation could yield beneficial results.

So the obvious question is—why would the youth in France feel such widespread animosity towards a labor law restricting their rights while American youth allow their protections to be taken away without interest or reaction? This article attempts to answer that question by examining the cultural context of age-related legislation and high court decisions in both countries. By understanding the history of the youth movements in France and the United States, as well as the legal rationale for age-related legislation and critical court decisions in both countries, we can make sense of the disparate reactions of the younger workers. With this understanding, American youth can act to shed their indifference and take action through a collective voice in response to any future political or judicial action eroding their (already severely restricted) employment protections.

This article begins this analysis by examining the structure of French employment law, with a particular emphasis on the protections against age discrimination as well as France's role in the European Union. The article then examines the French Constitutional Council's decision upholding the constitutionality of the recently proposed youth labor law. The article further examines the reaction of French youth to the law, explaining how the social culture in the country resulted in widespread protests. The article then compares the structure of American employment law to that in France, focusing on the passage of the U.S. Age Discrimination in Employment Act, as well as recent U.S. Supreme Court decisions further eroding the employment protections of younger workers. The article continues with an examination of why American youth have not reacted to this legislation or

30. *Id.* at 590–92.

31. *See generally* Smith v. City of Jackson, 544 U.S. 228 (2005).

the Supreme Court decisions—explaining that the low unemployment rate in this country, the lack of union support for younger workers, and the lack of a history of successful protests in the United States have fostered a culture of indifference among American youth. Finally, this article proposes that young American workers must learn from French youth and find a collective voice to prevent their employment rights from being eviscerated altogether.

II. THE STRUCTURE OF FRENCH EMPLOYMENT LAW

To fully understand the emotional reaction of French youth to the "First Job Contract" restricting the rights of younger workers, a discussion of the structure of French labor law is necessary. Compared to the United States, France enjoys widespread worker benefits and employment protections.[32] Indeed, French workers are entitled by law to five weeks of compensated leave, receive mandatory profit-sharing, and work only thirty-five hours in the standard week.[33] France also has an extensive social security system of which employers shoulder a heavy burden.[34] These benefits and protections "reflect the prevailing social-democratic political ideology."[35] Importantly, unlike American law where an employee can be terminated for *any* nondiscriminatory reason, employees in France enjoy what is known as "just cause dismissal."[36] This system provides employees with protections from termination far greater than any protections found in the United States,

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32. 1 INT'L LABOR LAW COMM., AM. BAR ASS'N, INTERNATIONAL LABOR AND EMPLOYMENT LAWS 3-1 (William L. Keller et al. eds., 2d ed. 2003). *But see* BRICE DICKSON, INTRODUCTION TO FRENCH LAW 186 (1994) (noting that "[t]here is a remarkable similarity between the [French and English] legal systems" in the area of employment law).

33. INT'L LABOR LAW COMM., *supra* note 32. As of July 1, 2004, the minimum wage in France was 7.61 euros per hour. *Id.* at 3-9 (Supp. 2005); *see also* Michael K. Edmonson, Note, *A Tale of Two Appellations: A Comparative Study of International Agreements and Prevailing Law Impacting the Availability of Seasonal Employees for the Wine-Grape Harvest in California's Napa Valley and France's Bordeaux Appellation*, 31 GA. J. INT'L & COMP. L. 547, 563–64 (2003) ("[T]he [French Labor] code . . . specifies a standard workweek of thirty-five hours, and requires that additional compensation shall be paid to employees for hours worked beyond that standard.").

34. INT'L LABOR LAW COMM., *supra* note 32.

35. *Id.*; *see also* Antoine Vivant, *France*, *in* EU & INTERNATIONAL EMPLOYMENT LAW 1, 9 (Viv Du Feu et al. eds., 2001) ("France has developed an abundant and complex set of laws for the protection of the employee, making France the 'social laboratory' of Europe.").

36. INT'L LABOR LAW COMM., *supra* note 32, at 3-2; *see* Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1514 n.413 (1996) ("In France, the just cause requirement requires the judges to find the actual existence of the alleged fact which constituted cause for dismissal as well as the fact that the cause alleged is the true reason for the dismissal at the time of the dismissal.").

outside of the union setting.[37] These protections attach after an initial "trial period" between the employer and employee, which typically lasts about one to three months.[38] After the trial period, the employment contract entered into between the parties "becomes definite" and the worker "can only be dismissed for cause or for economic reasons."[39]

A. Termination for Just Cause and Union Protections

France's requirement that termination must be for "just cause" is derived from the concept that "one of the foremost objectives" of employment law in the country is guaranteeing "security of employment."[40] Under the "just cause" system, an employer in France must provide a legitimate reason for an employee's termination, giving the employee "procedural and substantive due process."[41] Thus, dismissal must be based on a "genuine and serious" rationale, and the rationale must be provided in writing if requested by the employee.[42] The employer's reason for the termination

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37. *See generally* Derek C. Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971) (providing a comparative look between American labor protections and the laws of other countries).

38. INT'L LABOR LAW COMM., *supra* note 32, at 3-9 (noting that while the trial period, or *période d'essai*, is in effect, "the employee can be dismissed without formalities or particular reasons"); FRANCIS LEFEBVRE, FRANCE: LEGAL AND TAX GUIDE 326 (1992) (discussing the trial period and noting that either the employer or employee can end the employment relationship "at any moment without notice or indemnities"). Indeed, the typical French worker also has protections from being disciplined; there is a "two-phase procedure" which must be followed under the Labor Code to sanction a worker, including an interview and "official notification." LEFEBVRE, *supra*, at 344–45. The employee may further appeal the disciplinary action to a labor tribunal, which is a bipartisan body which has the authority to quash the discipline. *Id.* at 346.

39. LEFEBVRE, *supra* note 38, at 317.

40. MICHEL DESPAX & JACQUES ROJOT, LABOUR LAW AND INDUSTRIAL RELATIONS IN FRANCE 109 (1987).

41. INT'L LABOR LAW COMM., *supra* note 32, at 3-2; *see also* LEFEBVRE, *supra* note 38, at 335–36 (defining "real and serious cause" under the statute and case law); Erin E. Bahn, Note, *To Labor in the Dancing World: Human Rights at Work*, 7 BUFF. HUM. RTS. L. REV. 105, 127 (2001) (Employment law in France "has been subject to a special regulatory regime dating back to 1975 and is defined according to two essential criteria: the reason for dismissal must not relate to the individual concerned (licenciement pour motif individuel) and the termination must derive from the abolition or alteration of the job or from a refusal to accept a substantive change to the contract of employment." (quoting ANTOINE LYON-CAEN, EUROPEAN EMPLOYMENT AND INDUSTRIAL RELATIONS GLOSSARY: FRANCE 478 (1993))) (internal quotation marks omitted).

42. Karen Paull, Note, *Employment Termination Reform: What Should a Statute Require Before Termination?—Lessons from the French, British, and German Experiences*, 14 HASTINGS INT'L & COMP. L. REV. 619, 656–57 (1991) ("The labor tribunals and the reviewing courts have interpreted 'genuine' in a manner that is fairly deferential to managerial judgment, but 'serious' has been interpreted to mean that employers' actions must be evaluated in light of principles of progressive discipline."); *see* LEFEBVRE, *supra* note 38, at 335–39 (discussing what

must relate to "an established, objective, exact and sufficiently serious reason" that is based on the employee's poor behavior or "aptitude," or on a justified business necessity.[43] Case law interpreting what would establish a genuine or serious reason for termination has found that excessive tardiness, threatening behavior, lack of qualifications, insubordination, disloyalty, and drug use on the job all warrant an employee's discharge.[44] Economic reasons can also justify an employee's discharge for "redundancy," though this involves a separate inquiry into the employer's financial status.[45] The cases have rejected, however, an employer's attempt to terminate an employee based on age, illness, unrelated criminal convictions, union activity, or personal life.[46]

The employee is also entitled to a hearing prior to termination to listen to the employer's rationale and may respond with any concerns.[47] Indeed, the dismissal process itself is quite complex. Initially, an employer must contact an employee within two months of learning of the reason that forms the basis of the termination, propose a meeting date, and inform the worker that he is entitled to representation.[48] At the meeting, the employer should clearly set forth the reason for the dismissal, and provide the employee with an opportunity to explain why the termination is unjust.[49] If the employer

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constitutes "real and serious cause" under the French Labor Code and case law, and setting forth the dismissal process under French law).

43. Vivant, *supra* note 35, at 95; *see* LEFEBVRE, *supra* note 38, at 335 ("Real and serious cause may be based on the fact that an individual is not performing up to standards, provided that such lack of adequate performance is provable with factual circumstances.").

44. Vivant, *supra* note 35, at 95–96; *see also* INT'L LABOR LAW COMM., *supra* note 32, at 3-10 (noting that under existing court precedent discharge is proper for incompetence, inability to meet quotas, professional shortcomings, lack of trustworthiness, and sexual harassment). *See generally* DICKSON, *supra* note 32, at 200–01 (setting forth dismissal process in France).

45. INT'L LABOR LAW COMM., *supra* note 32, at 3-47 to -48. Discharge for economic purposes is codified by statute, and the "mere aim of cutting expenses in a healthy company would not be a justified reason for a redundancy." *Id.* at 3-48. There is also a separate process for effectuating a reduction in force. *Id.* at 3-48 to -55; *see also* Bruce D. Fisher & Francois Lenglart, *Employee Reductions in Force: A Comparative Study of French and U.S. Legal Protections for Employees Downsized Out of Their Jobs: A Suggested Alternative to Workforce Reductions*, 26 LOY. L.A. INT'L & COMP. L. REV. 181, 200–03 (2003) (discussing recent revisions to economic downsizing law in France).

46. Vivant, *supra* note 35, at 96; *see also* LEFEBVRE, *supra* note 38, at 335–36 ("The courts have held that a vague assertion that an employee chronically failed to work energetically is insufficient justification for a dismissal.").

47. Paull, *supra* note 42, at 657; *see* DESPAX & ROJOT, *supra* note 40, at 115–16 (discussing procedural requirements of hearing prior to employee termination); LEFEBVRE, *supra* note 38, at 336–37 (discussing the conciliation process and pre-termination meeting).

48. Vivant, *supra* note 35, at 96–97; *see also* LEFEBVRE, *supra* note 38, at 336 (setting forth requirements of the "convocation letter").

49. LEFEBVRE, *supra* note 38, at 336–37 (discussing requirements of the "pre-dismissal meeting"); Vivant, *supra* note 35, at 97.

decides to proceed with the discharge, he must inform the employee of the decision within thirty days by registered mail, "clearly and precisely" setting forth its justification.[50] Should the matter proceed to litigation, the employer is restricted to using only the rationale set forth in the dismissal letter as the true rationale for the termination.[51] An employee who is dismissed is entitled to considerable severance benefits under French law, even if the termination is for just cause.[52] These benefits include payment of at least "one-tenth of a month's salary for each year of service," with additional compensation given to workers with more than ten years of service.[53] The Labor Courts, which consist of equal numbers of employee and employer representatives, attempt to conciliate and, if unsuccessful, oversee hearings of individual employment contract disputes.[54] If the dispute is over more than a requisite amount of money, the court's decision can be appealed.[55]

Additionally, the power of labor unions in France is far more significant than in the United States.[56] Indeed, unlike the United States, the French Constitution actually grants "the freedom to form unions and the right to strike" as basic rights to all individuals.[57] Unions represent employees in negotiating collective bargaining agreements, and can strike over issues

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50. Vivant, *supra* note 35, at 97; *see* INT'L LABOR LAW COMM., *supra* note 32, at 3-11 to -12 (discussing procedural requirements of dismissal notice); LEFEBVRE, *supra* note 38, at 337 (noting requirement that employer must set forth reasons for termination in letter).

51. Vivant, *supra* note 35, at 97; *see* LEFEBVRE, *supra* note 38, at 337 ("The reasons indicated in the dismissal letter have substantial significance for any subsequent appeal.").

52. INT'L LABOR LAW COMM., *supra* note 32, at 3-2; Vivant, *supra* note 35, at 98. An exception exists for employees who are terminated for "gross misconduct." *Id.*

53. Vivant, *supra* note 35, at 98; *see* INT'L LABOR LAW COMM., *supra* note 32, at 3-13 ("Indemnities are due in cases of dismissal for personal reasons or dismissal arising from a reduction in the work force. They are not due when the employee is terminated for gross negligence or willful misconduct."); LEFEBVRE, *supra* note 38, at 337–38 (discussing employer indemnity obligations under French law).

54. INT'L LABOR LAW COMM., *supra* note 32, at 3-15.

55. *Id.* at 3-15 to -16.

56. *Cf.* DICKSON, *supra* note 32, at 190–91 ("To a greater extent than in English law, the [collective bargaining] agreement constitutes a source of law in France and it binds not just members of the union or unions party to the agreement, but also members of other unions in the same workforce and employees who are not members of any union."); Vivant, *supra* note 35, at 9 ("One of the main features of French employment law is the supremacy of collective bargaining agreements over other sources of employment law which ostensibly organise work relations."); *infra* Part VII.B (discussing relative power of French labor unions).

57. INT'L LABOR LAW COMM., *supra* note 32, at 3-19 to -20 (citing the 1958 French Constitution and the Preamble to 1946 French Constitution); *see also* DICKSON, *supra* note 32, at 189 ("[T]he Preamble to the 1946 Constitution, incorporated by reference into the Constitution of 1958, states that every person can defend his or her rights and interests by trade union activity and can belong to the trade union of his or her choice."); LEFEBVRE, *supra* note 38, at 358–59 (discussing employee union rights under law).

related to "general salary level, health and safety measures, or violations of union rights."[58] Any collective disputes, such as allegations of an improper strike, are outside the jurisdiction of the Labor Courts and must therefore be brought as a civil dispute.[59]

Employers in France are also restricted from discriminating against individuals either in the hiring process or in making employment decisions.[60] Discrimination claims can be brought in either the criminal or civil court system.[61] Unlike the United States, employers that violate the anti-discrimination laws in France can be subject to criminal, rather than civil, penalties.[62] Indeed, the French Penal Code expressly prohibits discrimination on the basis of "origin, sex, family situation, state of health, handicap, customs, political opinions, trade union membership or belonging or non-belonging, real or supposed ethnic group, race or religion."[63] Because criminal penalties (including imprisonment) are involved, employment discrimination claims under the French Penal Code require a showing of intent and are often difficult to prove.[64] Similar to Title VII of the Civil Rights Act of 1964 in the United States,[65] Article 122-45 of the

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58. INT'L LABOR LAW COMM., *supra* note 32, at 3-33; *see* LEFEBVRE, *supra* note 38, at 365–67 (discussing collective bargaining, a union's right to strike, and the rare use of "lock-outs" under French law).

59. INT'L LABOR LAW COMM., *supra* note 32, at 3-37.

60. Vivant, *supra* note 35, at 63; *see* LEFEBVRE, *supra* note 38, at 319–20 (setting forth classes protected from discrimination in the hiring process).

61. Vivant, *supra* note 35, at 64C (discussing differences between criminal and civil court systems as related to employment discrimination claims).

62. *Id.* ("All discrimination-based claims are criminal offences and must therefore be prosecuted within the criminal court system."); Donna M. Gitter, Comment, *French Criminalization of Racial Employment Discrimination Compared to the Imposition of Civil Penalties in the United States*, 15 COMP. LAB. L.J. 488, 505 (1994) ("Perhaps the most significant difference between French and U.S. methods of dealing with employment discrimination is that France treats [the] problem as a crime while the United States imposes civil penalties to redress this type of prejudice in the workplace.").

63. Vivant, *supra* note 35, at 63 (citing Articles 225-1 and 225-2 of the French Penal Code); *see* DICKSON, *supra* note 32, at 192 ("It is fair to say that today discrimination . . . is contrary to French *ordre public* and the new *Code pénal* is quite explicit in its condemnation of such practices."). Interestingly, France also recently extended its employment protections to prohibit psychological harassment against employees. *See* Rachel A. Yuen, Note, *Beyond the Schoolyard: Workplace Bullying and Moral Harassment Law in France and Québec*, 38 CORNELL INT'L L.J. 625, 635 (2005) (setting forth the elements of a psychological harassment claim in France).

64. *See* Vivant, *supra* note 35, at 63 (noting high burden of proof to establish criminal conviction on employment discrimination claim); Gitter, *supra* note 62, at 506 (arguing that one of the downsides of criminalizing discrimination "is the high standard of proof necessary to sustain a criminal conviction"); *see also id.* (citing Articles 225-1 and 225-2 of the French Penal Code that set forth prohibitions on discrimination on various protected grounds).

65. 42 U.S.C. § 2000e-2(a)(1)–(2) (2000).

Labor Code (or *Code du travail*) also widely prohibits discrimination in France, and provides that:

> No person may be excluded from a recruiting procedure, or from a traineeship or from professional training within an undertaking and no employee may be sanctioned or dismissed [...] because of his ethnic origin, gender, moral or sexual orientation, age, family status, genetic makeup, real or supposed race, [...], political opinions, union-related or mutualist activities, religious or political beliefs, physical appearance, patronym, health conditions or disability, except for physical inaptitude established by a medical doctor.[66]

The *Code du travail* also provides a worker who has been discriminated against with the opportunity for monetary compensation.[67]

B. Discrimination on the Basis of Age

Until recently, French employment law did not contemplate discrimination on the basis of age.[68] The Labor Code did state, however, that "all clauses providing for the automatic termination of an employment contract on the ground of the employee's age" are void.[69] Age discrimination is not often set forth by an employer under the terms of the contract, and must be inferred through the employer's actions—thus making such a provision ineffectual in addressing more subtle forms of age discrimination. The European Union (EU), however, of which France is a member, issued directive 2000/78/EC requiring that all member states implement legislation prohibiting certain forms of discrimination, including age discrimination.[70]

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66. CODE DU TRAVAIL [C. TRAV.] art. L122-45 (Fr.), *translated in* GEORGE BERMANN & PIERRE KIRCH, FRENCH BUSINESS LAW IN TRANSLATION IX-18 (2005); *see* Vivant, *supra* note 35, at 63.

67. Gitter, *supra* note 62, at 511 n.129 ("France's only code provision which could be read to provide explicitly for pecuniary compensation to an employment discrimination victim is L. 122-8 of the Labor Code . . . .").

68. Vivant, *supra* note 35, at 64B ("Age discrimination is hardly envisaged by the law.").

69. *Id.*; *see also* LEFEBVRE, *supra* note 38, at 332–33 (discussing retirement process in France and noting that the "mandatory retirement" is no longer valid under the Labor Code).

70. Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC); *see* Vivant, *supra* note 35, at 64B ("[B]y 2006 France will have anti-age discrimination legislation when it implements the EC Framework Directive."); Tomas Felcman, Note, *Crafting Employment Policy During EU Accession: Strategies for Romania and Bulgaria*, 15 MINN. J. INT'L L. 189, 201–02 (2006) (setting forth terms of the EU "employment nondiscrimination directive").

C. France's Role in the European Union

As a member of the EU, France is responsible for implementing EU regulations and directives and respecting opinions of the European Court of Justice.[71] The EU is a "supranational international organization" that has the authority to issue legislation in many areas, including employment and labor law.[72] When the EU issues a directive, the member countries are legally bound to its terms.[73] Thus, if there is a conflict between the laws of a specific country and an EU directive, the directive controls—irrespective of when the domestic law was implemented.[74] Only the ultimate objective of the directive is binding, however, and the individual countries are free to choose the specific "form and method of implementation."[75] Thus, as long as the "specified minimum standards" of the directive are achieved by a country's legislation, the country will have complied with the directive.[76]

To comply with the EU directive 2000/78/EC regarding equality in the workplace, France recently amended its Labor Code to include a prohibition against age discrimination.[77] The purpose of the directive was broad—to establish "minimum requirements" for member countries to prohibit discrimination in the workplace because of "religion or belief, disability, age, or sexual orientation."[78] The directive also encompassed discrimination

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71. INT'L LABOR LAW COMM., *supra* note 32, at 3-3. On March 25, 1957, France entered into the Treaty of Rome and is therefore a "founding member" of the EU. *Id.*; *see also* DESPAX & ROJOT, *supra* note 40, at 38 (noting that "French law has often been amended" to comply with requirements of the international community); Vivant, *supra* note 35, at 15 (setting forth "structure" of the European Court of Justice).

72. INT'L LABOR LAW COMM., *supra* note 32, at 1-1. It is also important to note that the "term 'labor and employment law' does not translate easily because of differences in language." *Id.* at 1-3. The traditional distinction drawn between employment law (which suggests law on individual employment) and labor law (which suggests law on collective employment) is not as defined in Europe. *Id.* Rather, "the European term 'labor law' covers all laws relating to employment." *Id.*

73. *Id.* at 1-22; *see also* Vivant, *supra* note 35, at 23 (noting that the Treaty of Rome clearly explains that directives are binding on each member country but each nation has "the choice of form and methods.")

74. *See* INT'L LABOR LAW COMM., *supra* note 32, at 1-22 to -23.

75. *Id.* at 1-22.

76. *Id.*; *see also* Vivant, *supra* note 35, at 23 ("A directive does not generally become binding on the citizen of a particular Member State until his government has transformed it into domestic law. This allows Member States to take account of special domestic circumstances in the drafting of their domestic legislation.").

77. C. TRAV. art. L122-45 (Fr.), *translated in* BERMANN & KIRCH, *supra* note 66.

78. Nancy J. King et al., *Workplace Privacy and Discrimination Issues Related to Genetic Data: A Comparative Law Study of the European Union and the United States*, 43 AM. BUS. L.J. 79, 145 (2006) (citing Council Directive 2000/78, art. 1, 2000 O.J. (L 303) 16 (EC)); *see also* Gavin Barrett, *"Shall I Compare Thee to . . . ?" On Article 141 EC and* Lawrence, 35 INDUS. L.J. 93, 96 (2006) ("[EU] [c]ommunity legislation has now extended to combating

in "both the public and private sphere."[79] The EU directive further required that all states implement the age discrimination measures by 2006.[80] In Article 6 of the directive, certain exceptions for the age discrimination requirement were permitted.[81]

To comply with the EU directive, Article 122-45 of the French Labor Code now provides that an employee cannot be "sanctioned or dismissed" because of that individual's age.[82] Interestingly, however, France did not enact the possible exceptions provided for by the EU directive, and the statute is clear that *all* forms of age discrimination are prohibited.[83] Thus, France went beyond the minimum provisions set forth in the EU directive, and granted its citizens additional protections on the basis of age. Based on the clear terms of the statute, then, the potential for a "reverse" age discrimination claim that older workers are given preference over younger workers exists.[84] It does not appear that such a reverse discrimination claim was even contemplated by the government, however, or would be well received by the courts.

France's Constitutional Council was quickly forced to consider just such a reverse age discrimination claim as related to the First Job Contract.[85] The Council would reject the claim, creating further turmoil in the country.[86]

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discrimination in the workplace on grounds of racial or ethnic origin, religion or belief, disability, age or sexual orientation . . . .").

79. King et al., *supra* note 78, at 145 (citing Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC)).

80. Vivant, *supra* note 35, at 64B (citing Council Directive 2000/78, 2000 O.J. (L 303) 16 (EC)).

81. Council Directive 2000/78, art. 6, 2000 O.J. (L 303) 19–20 (EC); Jarrett Haskovec, Note, *A Beast of a Burden? The New EU Burden-of-Proof Arrangement in Cases of Employment Discrimination Compared to Existing U.S. Law*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 1069, 1083 n.91 (2005) ("This directive also provides for an exception specifically relating to age and gives examples of differences in treatment that Member States may permit (Article 6), perhaps reflecting a belief either that making distinctions based on age is reasonable and legitimate more often than in the case of distinctions made on other grounds or that potential victims of age discrimination are not in as much need of protection as other potential victims of discrimination.").

82. C. TRAV. art. L122-45 (Fr.), *translated in* BERMANN & KIRCH, *supra* note 66; *see also* INT'L LABOR LAW COMM., *supra* note 32, at 3-69 & n.151 (noting that French Law No. 2001-1066, which was passed on November 16, 2001, added age to the list of protected classes).

83. C. TRAV. art. L122-45 (Fr.), *translated in* BERMANN & KIRCH, *supra* note 66; *see* Richard Baker, *Age Discrimination: Implementing the Directive in the EU*, THELAWYER.COM, May 24, 2004, http://lawzone.thelawyer.com/cgi-bin/item.cgi?id=110183 ("The age criterion [of the EU Directive] was added [to the French Labor Code], with the exception of article 6 of the employment directive which provides employers with justification for discrimination in employment policy, labour market and vocational training objectives.").

84. C. TRAV. art. L122-45 (Fr.), *translated in* BERMANN & KIRCH, *supra* note 66

85. *See* CC decision no. 2006-535DC, Mar. 30, 2006, http://www.conseil-constitutionnel.fr/decision/2006/2006535/2006535dc.pdf.

III. FRENCH CONSTITUTIONAL COUNCIL'S DECISION ON YOUTH LABOR LAW[87]

In an effort to defeat the youth employment legislation in the courts, numerous plaintiffs brought a claim before France's Constitutional Council—the highest body considering constitutional claims pertaining to specific legislation in the country[88]—alleging that the First Job Contract violated the French Constitution.[89] The plaintiffs maintained that the law was unclear, unintelligible, and problematic on many different grounds, including that it violated the basic protections of equality under the law and the right to employment and that the law was not enacted pursuant to the proper procedural channels.[90] The plaintiffs further alleged that the newly enacted law, which permitted the discharge of individuals twenty-six years of age or less within the first two years of their employment, violated the EU directive 2000/78/CE on equality of employment standards, as well as the 1789 Declaration of the Rights of Man.[91]

Initially, the Council rejected the argument that there were any procedural irregularities in the law's passage, noting that all of the necessary requirements had been satisfied.[92] As to the substance of the plaintiffs' claims, the Council noted that the law did limit certain protections given to older workers, including the right to dismissal for only "real and serious" reasons.[93] The Council did not find this problematic,

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86. *Id.*; Smith, *supra* note 13.

87. The author would like to thank Dr. John E. Sweeney and James Antonio for their assistance in the translation of the French Constitutional Council decision.

88. *See generally* Peter L. Lindseth, *Law, History and Memory: "Republican Moments" and the Legitimacy of Constitutional Review in France*, 3 COLUM. J. EUR. L. 49 (1996–97) (discussing authority and decisions of France's Constitutional Council); James E. Pfander, *Government Accountability in Europe: A Comparative Assessment*, 35 GEO. WASH. INT'L L. REV. 611, 618 (2003) ("The Constitutional Council has no appellate or reference jurisdiction with respect to the ordinary courts; rather, it performs the somewhat limited function of testing the constitutionality of legislation largely in the abstract, after passage but before promulgation of laws, at the instigation of the political branches of government."); Edward A. Tomlinson, *Reception of Community Law in France*, 1 COLUM. J. EUR. L. 183, 186 (1995) (noting that the Constitutional Council "reviews the constitutionality of international agreements and statutes before they go into effect").

89. CC decision no. 2006-535DC, Mar. 30, 2006, http://www.conseil-constitutionnel.fr/decision/2006/2006535/2006535dc.pdf. Indeed, French discrimination law originates "from the [French Constitution], which guarantees equality before the law." DICKSON, *supra* note 32, at 192.

90. CC decision no. 2006-535DC, Mar. 30, 2006, http://www.conseil-constitutionnel.fr/decision/2006/2006535/2006535dc.pdf.

91. *Id.*

92. *Id.*

93. *Id.*

however, as the law provides other protections, including some severance pay to the discharged employee, as well as review of the dismissal (in some instances) by a labor court judge.[94]

Additionally, the Council rejected the plaintiffs' argument that the First Job Contract violated the principle of equality under the law.[95] The Council noted that there are no constitutional rules prohibiting the government from attempting to assist those who are disadvantaged.[96] And, that is exactly what the Council perceived was happening here—the government was simply responding to the high unemployment rate among youth and attempting to ameliorate this situation by making it easier for employers to hire these younger workers.[97] Thus, because the government was acting with the best interest of everyone in mind, its actions could not be held unconstitutional, despite the fact that the ultimate result of the statute's passage is that younger employees will be treated differently under the law.[98]

Similarly, the Council rejected the plaintiffs' argument that the law restricted the right of employment for younger employees.[99] The plaintiffs had maintained that the law would disproportionately disadvantage the employment opportunities of younger workers, arguing that because younger employees would not know the true reason for their dismissal, they would have an even more difficult time finding subsequent employment.[100] The Council struck down this argument on the same basis that it rejected the plaintiffs' equality argument—the Council believed that the government was acting to assist younger individuals in finding employment, and thus cannot be held to be violating the constitutional rights of younger workers.[101] The Council further expressed that its role is not to second guess the legislation by which Parliament seeks to accomplish its goals.[102] Thus,

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94. *Id.*; *see also* Moore, *supra* note 11 ("In its opinion upholding the law, which was approved by the parliament [sic] earlier this month, the constitutional council [sic] noted that young employees who are fired after four months on the job have the right to appeal their dismissal to a labor court judge.").

95. CC decision no. 2006-535DC, Mar. 30, 2006, http://www.conseil-constitutionnel.fr/decision/2006/2006535/2006535dc.pdf.

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.* Interestingly, the language of the Constitutional Council is not unlike that found in many decisions of the U.S. courts, which refuse to act as "super-personnel" departments that oversee the employment decisions of corporations. *See, e.g.*, Jaramillo v. Colo. Judicial Dep't, 427 F.3d 1303, 1308 (10th Cir. 2005) ("The courts may not 'act as a super personnel department that second guesses employers' business judgments.'" (quoting Simms v. Okla. *ex rel.* Dep't of Mental Health & Substance Abuse Servs., 165 F.3d 1321, 1328 (10th Cir. 1999))); Davis v.

while there may be better ways of reducing unemployment among youth, the Constitutional Council will not attempt to rewrite a law where Parliament has not violated the constitution in pursuing a legitimate goal, and the method of attaining that goal is not clearly inappropriate.[103]

The Council further rejected the plaintiffs' argument that the law violated France's Declaration of the Rights of Man passed in 1789.[104] Plaintiffs had argued that the law violated certain contractual guarantees and that the law stripped them of the right to the recourse set out in the Declaration.[105] In dismissing these arguments, the Council found that the law did not restrict the plaintiffs' liberty to enter into a contractual relationship, and that the law still provides certain protections to younger workers.[106] In particular, the Council noted that the plaintiffs would still have a reviewable claim that their dismissal was based on discriminatory grounds.[107]

Finally, the Constitutional Council dismissed the plaintiffs' arguments that the First Job Contract violated the equality of employment standards set forth in EU directive 2000/78/CE, as well as other international agreements.[108] The Council determined that it was not within its province to decide whether a particular law comports with a specific directive agreed upon by the international community.[109] Thus, it need not consider plaintiffs' claims on this point.[110]

The Constitutional Council therefore rejected the plaintiffs' claims.[111] In essence, the Council determined that it would not second guess the wisdom of the law passed by the legislature, where, on its face, that law attempted to assist, rather than disadvantage, younger workers. The Council further

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Town of Lake Park, 245 F.3d 1232, 1244 (11th Cir. 2001) ("Title VII is not designed to make federal courts 'sit as a super-personnel department that reexamines an entity's business decisions.'" (quoting Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991))); Foster v. Arthur Andersen, L.L.P., 168 F.3d 1029, 1035 (7th Cir. 1999) ("As we often repeat, we do not sit as a super-personnel department that reexamines an employer's personnel decisions; we will not second-guess an employer's policies that are facially legitimate.").

103. CC decision no. 2006-535DC, Mar. 30, 2006, http://www.conseil-constitutionnel.fr/decision/2006/2006535/2006535dc.pdf.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* The Constitutional Council also addressed other provisions of the law, not relevant to the issue of whether it was constitutionally permissible to terminate younger workers. *Id.* The Council upheld some of these additional provisions, but found others contrary to the constitution. *Id.*

declined to visit the issue of whether the First Job Contract complied with the international agreements of which France is a signatory as this determination was not within its province.[112] The plaintiffs have no right to appeal this decision.[113] With this ruling, the Council reignited the explosive situation between protesting young workers and the government.[114] And, the decision took the issue out of the courts and threw it back into the political arena. Any hope that President Chirac or Prime Minister Villepin might have had of avoiding this conflict through a Council ruling striking down the law was gone.[115] The violence continued.[116]

IV. UNDERSTANDING THE REACTION OF FRENCH YOUTH

The Constitutional Council's ruling, combined with the continued rioting, forced President Chirac into the weakened position of offering a watered down version of the law to the unions—reducing the two year trial period to a single year.[117] Sensing victory was near, the labor unions and youth did not back down, pressing for further protests across the country.[118] Only a few days later, Chirac scrapped the entire law.[119] The youth had won.

But at what cost? Weeks of violence and rioting in the streets of France left the country in disarray. Certainly this type of uncontrolled violence cannot be endorsed as a way of bringing about social change.[120] Most Americans watching this story unfold would be unlikely to understand how

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112. *Id.*

113. Moore, *supra* note 11.

114. *See* CC decision no. 2006-535DC, Mar. 30, 2006, http://www.conseil-constitutionnel.fr/decision/2006/2006535/2006535dc.pdf; Smith, *supra* note 13.

115. *See* Moore, *supra* note 11 (noting that the Council's decision validating the First Job Contract places "new pressure on President Jacques Chirac to resolve the crisis that threatens to destabilize his government").

116. Smith, *supra* note 13; Smith, *supra* note 14.

117. *See* Smith, *supra* note 14.

118. *Id.* (describing the French reaction to Chirac's speech).

119. *See* Sciolino, *supra* note 18 (describing Chirac's retreat from the youth labor law).

120. An analogy can be made between the violent protests in France and the extent to which civil rights protests in the United States turned violent in the 1960s. Interestingly, it has been recognized that Justice Black became concerned at the time that "the civil disobedience tactic of the civil right[s] demonstrators was one that could no longer be condoned. Black was concerned that what were now marches might soon turn into riots and mobs." McKenzie Webster, Note, *The Warren Court's Struggle with the Sit-in Cases and the Constitutionality of Segregation in Places of Public Accommodations*, 17 J.L. & POL. 373, 395 (2001). Justice Black did not want protesters believing that they could "continue to break the law in the belief the Supreme Court will sustain the legality of their claims." *Id.* at 396 (quoting HUGO L. BLACK & ELIZABETH BLACK, MR. JUSTICE AND MRS. BLACK 92 (1986)) (internal quotation marks omitted).

a simple employment law—limited to only two years in duration—could lead to this type of large-scale protest.[121] Without more than a basic understanding of the terms of the First Job Contract and the Constitutional Council's decision, the reaction of French youth does appear irrational and misplaced. However, when taking the entire social context into account, the riots are not overly surprising. Indeed, frustration among younger workers in France is not a new phenomenon—it has persisted for years.[122] French youth have suffered from an unbearably high unemployment rate for decades, and the "constantly increasing rate" of younger workers without jobs "has drawn the attention of successive governments."[123] In 1977, the government attempted to relieve this persistent problem by reducing social security obligations for employers hiring younger employees.[124] The government passed subsequent legislation in 1981, whereby employers hiring youth would "receive allowances from the state."[125] And, in 1984, the French government established a Public Works' program targeted at the increased employment of individuals between sixteen and twenty-one years of age.[126] Unemployment of men aged fifteen to twenty-four stood at 22.1% in 1984, and was 30.2% for women in the same age category.[127]

Despite governmental efforts to alleviate this problem, the high unemployment among French youth persists years later, and currently stands at the same level as it was twenty years earlier—around 22%.[128] Obviously, this high rate of unemployment[129] has been a source of continual frustration for French youth for decades. The wages, protections, and benefits of employment in France are significant compared to the rest of the world.[130] French youth, however, are often unable to break into this labor market, and must watch helplessly as their elders reap the benefits of the

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121. *See, e.g.*, Duffy, *supra* note 4 ("But one must also understand that the 35-hour workweek, the six weeks of paid annual leave, the jobs for life are as endangered a species as the dodo bird. None of the kids outside Napoleon's tomb want to hear it, of course, but change happens. Just ask the folks at GM.").

122. *See generally* Higgins, *supra* note 20 (noting that the new employment law "crystallized a deeper French anxiety").

123. DESPAX & ROJOT, *supra* note 40, at 28.

124. *Id.* ("'Pacts for employment' excluded from wage-based social security contributions employers who hired new employees below 25.").

125. *Id.*

126. *See id.* at 28–31. "A youth who performs tasks under this system receives compensation" and the programs "are undertaken for the benefit of society (social work, improvement of the environment, etc.)." *Id.* at 30–31.

127. *Id.* at 29 tbl.9.

128. Galloni, *supra* note 19.

129. *See generally* DESPAX & ROJOT, *supra* note 40, at 28–31.

130. *See supra* Part II.A (discussing labor protections and benefits in France).

system.[131] The inability to attain employment has even been "associated with a wide range of adverse psychological and physical health effects ranging from a loss of self-esteem to increased mortality."[132]

It is not surprising, then, that the labor law enacted by the French government—which was designed to assist younger workers in finding employment—was met with widespread speculation and protest.[133] The law, which permitted employers to discharge employees under the age of twenty-six without cause if the termination occurred within two years of the worker's start date,[134] rather than the traditional one-to-three month trial period,[135] was likely seen as an attempt to institute yet another bar to their ultimate goal—attaining permanent employment with its associated benefits.[136] French youth perceived that they were truly the "throwaway" or "Kleenex generation."[137]

With the government seemingly against them, and their claim rejected by the Constitutional Council, French youth initiated an aggressive and widespread protest in the country.[138] Such protests are commonplace in French culture, and are almost considered a right-of-passage for each generation.[139] Indeed, in May 1968 students and unions across France engaged in protests challenging "restrictive government policies" that resulted in clashes with police, the occupation of French universities, and strikes in many factories.[140] French President Charles de Gaulle resigned the

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131. *See supra* text accompanying notes 127–28 (discussing unemployment levels of French youth).

132. Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363, 399 (2002).

133. *See supra* notes 4–22 and accompanying text (discussing reaction of French youth to the proposed labor law).

134. Sciolino & Smith, *supra* note 3 (discussing the proposed French labor law).

135. INT'L LABOR LAW COMM., *supra* note 32, at 3-9.

136. *See* Smith, *supra* note 14 (discussing how French youth perceived the employment law).

137. *See* John Lichfield, *Gangs Set Paris on Fire in Law Protests*, INDEPENDENT (UK), Mar. 24, 2006, at 28 ("Young university protesters say the law treats them as a 'throwaway' generation, deprived of the employment protections enjoyed by their parents. . . . Other demonstrators carried placards accusing the jobs law of making the young into a 'Kleenex' generation . . . .").

138. *See* Smith, *supra* note 13.

139. *See infra* notes 140–45 and accompanying text (discussing various French student protests over time).

140. Kathleen Neal Cleaver, *Mobilizing for Mumia Abu-Jamal in Paris*, 10 YALE J.L. & HUMAN. 327, 329 (1998) (discussing student strike in 1968 and noting that "French students fought pitched battles with the police in the streets of Paris" in protest of "restrictive government policies"); *see* Lauren J. Aste, *Reforming French Corporate Governance: A Return to the Two-Tier Board?*, 32 GEO. WASH. J. INT'L L. & ECON. 1, 41 (1999) ("May 1968 [was] a watershed month in French history in which students and union members led protests

following year.[141] In 1986, a conservative French government held off on a proposal to "implement university reform" because of widespread student protests.[142] In 1994, France's Prime Minister was forced—in the face of widespread youth protests—to back away from a proposal to decrease the minimum wage for younger workers.[143] Even as recently as 2005, the Education Minister shelved essential parts of a school reform proposal when students and instructors protested.[144] President Chirac recently summarized this "culture of social conflict" in France, stating that the country has a "longstanding tradition" of moving "toward confrontation [rather] than to dialogue."[145] Additionally, the powerful unions in France—guaranteed to citizens by the constitution—provide French youth with a built-in collective means of protest that is almost nonexistent in the United States.[146] As demonstrated by the latest round of demonstrations by French

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throughout France, with students occupying French universities and employees conducting 'sit-down' strikes in their factories. As a result, employees and students—representatives of the 'little people'—gained a greater voice in politics.") (footnote omitted); Ascanio Piomelli, *Foucault's Approach to Power: Its Allure and Limits for Collaborative Lawyering*, 2004 UTAH L. REV. 395, 420 n.95 (2004) ("[T]he "events of May 1968, in which student uprisings, violently confronted by police, were followed by spontaneous strikes by workers and then a general strike that was ultimately defused by de Gaulle with assistance from the French Communist Party.") (citation omitted).

141. *See* Ethan Schwartz, Note, *Politics as Usual: The History of European Community Merger Control*, 18 YALE J. INT'L L. 607, 617 (1993) ("Charles De [sic] Gaulle had resigned the French Presidency in 1969 . . . ."); *see also* Michael I. Swygert, *Valparaiso University School of Law, 1879–2004: A Contextual History*, 38 VAL. U. L. REV. 627, 934 (2004) (noting that student protests of the Vietnam War "nearly toppled the government of De [sic] Gaulle in France" (quoting JACQUES BARZUN, FROM DAWN TO DECADENCE: 500 YEARS OF WESTERN CULTURAL LIFE, 1500 TO THE PRESENT 764 (2000))) (internal quotation marks omitted).

142. *French Job Law 'Constitutional,'* BBC NEWS, Mar. 30, 2006, http://news.bbc.co.uk/2/hi/world/europe/4860632.stm (summarizing the impact of different student protests in France over time).

143. Katrin Bennhold, *French Mass Protest Challenges Villepin; 400,000 March Against His Job Plan*, INT'L HERALD TRIB., Mar. 8, 2006, at 3.

144. *See French Job Law "Constitutional," supra* note 142 (summarizing the student and teacher protests over the reform proposal in 2005). France is not alone in its dilemma of properly addressing student protests. In Chile, over 700,000 teenagers recently abandoned their classrooms to protest the "education system" which they perceive as "inferior and discriminatory." Larry Rohter, *Chilean Promised a New Deal; Now Striking Youth Demand It*, N.Y. TIMES, June 5, 2006, at A11. The country's President is struggling to address this "domestic crisis." *Id.*

145. Thomas Fuller, *Workers and Bosses: Friends or Foes?*, INT'L HERALD TRIB., Jan. 11, 2005, at 1.

146. *See supra* notes 56–59 and accompanying text (discussing the structure of labor organizations in France).

youth, these unions are instrumental in organizing and conducting the protests.[147]

Thus, the student protests of the First Job Contract were not simply an anomaly. These student protests have occurred numerous times over the years, and have produced effective results for the protesters. By backing down to student demands in the past, France has fostered an environment where such protesting is not only acceptable, but also viewed as one of the primary means of effectuating social change. And, given the persistently high level of youth unemployment in the country, the most recent series of student protests is not likely to be the last.

American youth have had a far different reaction to legislation and court decisions affording greater protections to older employees. Students in this country have remained indifferent toward the erosion of their employment rights. The structure of American law and cultural context of American society reveals why.

V. THE STRUCTURE OF AMERICAN EMPLOYMENT LAW

Labor law in the United States differs from France in many respects. French employees work fewer hours, have more statutorily imposed benefits, and enjoy more union protections than their American counterparts.[148] The most significant difference, however, goes much more to the basic foundation of the legal protections offered in the two countries. While employees in France must be given a legitimate reason for their discipline or termination,[149] employees in the United States can be terminated for any "legitimate, nondiscriminatory reason."[150] Thus, most employers in the United States, outside of the union setting,[151] are free to

147. *See, e.g.*, Moore, *supra* note 19 (stating that unions orchestrated the protests "that drew millions of people onto the streets"); Smith, *supra* note 16 (noting that trade unions have "backed" the students in the country).

148. *See supra* Part II.A–B (discussing various protections and benefits of French employment law).

149. BERMANN & KIRCH, *supra* note 66, at IX-2 to -3; LEFEBVRE, *supra* note 38, at 335.

150. *See, e.g.*, Holcomb v. Powell, 433 F.3d 889, 896–98 (D.C. Cir. 2006) (analyzing whether employer provided a "legitimate, nondiscriminatory reason" for the adverse employment action); Lee v. Rheem Mfg. Co., 432 F.3d 849, 854 (8th Cir. 2005) (same); Fasold v. Justice, 409 F.3d 178, 184–86 (3d Cir. 2005) (same).

151. For an overview of the general protections afforded by unions in the United States, see generally Robert J. Rabin, *The Role of Unions in the Rights-Based Workplace*, 25 U.S.F. L. REV. 169 (1991).

terminate their employees within the confines of anti-discrimination law and certain other public policy and statutorily created exceptions.[152]

A. Termination for any Nondiscriminatory Reason: Employment-at-Will

The United States recognizes "employment-at-will"—the concept that an employer may terminate an employee for just about any reason that is not based on the employee's race, color, national origin, religion, sex, age or disability.[153] The theory traces its origins back to the nineteenth century U.S. commentator Horace Wood who remarked that "general or indefinite hiring is prima facie a hiring at will."[154] Though initially not well-received by the courts, and in direct contravention to English common law, the theory eventually gained widespread acceptance in the United States.[155] Currently, approximately two-thirds of the American workforce is subject to the employment-at-will doctrine, and these individuals go to work each day knowing that their employers can fire them at any time with little or no adverse consequences to the company.[156] Indeed, the judiciary in the United States—previously reluctant to acknowledge the doctrine—has now taken a very "narrow view" of its authority to examine employment decisions where there is no contract between the employer and employee.[157]

Even where the worker had some expectation of "job security," the employment-at-will doctrine will undermine these expectations.[158] In

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152. *See generally* Peter Stone Partee, Note, *Reversing the Presumption of Employment at Will*, 44 VAND. L. REV. 689, 693–701 (1991) (discussing various exceptions to the employment-at-will doctrine).

153. *See id.* at 689 ("The doctrine of employment at will has been a fixture of American common law for approximately a century."); *supra* notes 26–31 and accompanying text (discussing American protections against employment discrimination).

154. Michael T. Zoretic, Comment, Baldwin v. Sisters of Providence*: Washington Gives at Will Employees a Gun with No Ammunition to Fight Against Unjust Dismissal*, 14 U. PUGET SOUND L. REV. 709, 711 (1991) (quoting H. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 134 (1877)) (internal quotation marks omitted).

155. *Id.*; *see* Partee, *supra* note 152, at 692 ("English common law presumed that employment for an indefinite period was for a year, in the absence of custom or evidence to the contrary.").

156. Zoretic, *supra* note 154, at 711 n.4 ("Estimates vary, but approximately 60 to 65 percent of all employees are hired on an at will basis.").

157. *See* Note, *Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith*, 93 HARV. L. REV. 1816, 1818 (1980) [hereinafter *Protecting At Will Employees*]; Zoretic, *supra* note 154, at 711–13. Indeed, when considering discrimination cases, the courts frequently "rely on the employment at will doctrine to defeat the plaintiff's case." Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J. 1443, 1459 (1996).

158. *See Protecting At Will Employees*, *supra* note 157.

essence, then, the ongoing employment relationship is seen as a "series of unilateral contracts" offered by the employer; all the employer is required to do to end a worker's employment is to revoke the offer.[159] Because the individual did not "bargain for an express contractual protection against wrongful discharge,"[160] the courts do not feel required to examine an employer's nondiscriminatory justifications for an adverse employment action, irrespective of whether the action was taken "for good cause, for no cause or even for cause morally wrong."[161] Employers have therefore been issued a "license to be mean" in this country.[162]

The license to be mean, however, does not translate into a license to discriminate. More specifically, Title VII of the Civil Rights Act of 1964 provides that it is illegal for an employer:

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[163]

Thus, employers are restricted from making employment decisions on the basis of race, color, religion, sex, or national origin by the clear terms of

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159. *Id.*

160. *Id.* at 1819.

161. *Id.* (quoting Payne v. W. & Atl. R.R. Co., 81 Tenn. 507 (1884), *overruled on other grounds by* Hutton v. Walters, 179 S.W. 134 (1915)) (internal quotation marks omitted); *see also* Zoretic, *supra* note 154, at 712 (discussing "[m]utuality of contract" and the at-will employment relationship).

162. McGinley, *supra* note 157 (quoting Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193, 233 (1994)). In this respect, "judges often rely on the employment at will doctrine to conclude that the mere fact that the plaintiff proved that he was wrongfully discharged is insufficient to establish illegal discrimination." *Id.*

163. 42 U.S.C. § 2000e-2(a)(1)–(2) (2000). The language in the first paragraph has been recognized as providing the basis for prohibiting intentional discrimination, as it prohibits discrimination "because of" a protected characteristic. *See, e.g.*, Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712, 719–20 (7th Cir. 2005) (providing that § 2000e-2(a)(1) forms the basis for disparate treatment analysis under federal anti-discrimination law). The language in the second paragraph has been recognized as giving rise to disparate impact discrimination claims—those claims where no showing of intent is required. *See, e.g.*, *In re* Employment Discrimination Litig. Against Ala., 198 F.3d 1305, 1310–11, 1310 n.9 (11th Cir. 1999) (setting forth the basis for recognition of the theory of unintentional employment discrimination).

Title VII. Federal law further prohibits employers from discriminating on the basis of age[164] or disability.[165]

In the seminal case of *McDonnell Douglas Corp. v. Green*,[166] a failure to hire case, the Supreme Court clearly enunciated the standard- and burden-shifting framework for establishing a case of discrimination under American law.[167] Under the Supreme Court's analysis, an individual alleging employment discrimination must come forward with a prima facie case.[168] This requires a showing that the individual is a member of a protected class, is qualified for the position, suffered an adverse action, and that the employer continued to seek applications for the job opening.[169] The burden then shifts to the employer to establish *any* "legitimate, nondiscriminatory reason" justifying the particular employment decision.[170] Finally, the individual has an opportunity to demonstrate that the employer's purported legitimate reason is a pretext for discrimination.[171] Under this analysis, then, an employer is able to avoid liability for taking an adverse action against an employee where that decision is based on any nondiscriminatory reason.[172]

In addition to the basic structure of employment law, the remedies for an employee's discharge vary significantly between France and the United States as well. In France, where a termination is for "just cause," employees are entitled to benefits that include payment of at least "one-tenth of a month's salary for each year of service."[173] In the United States, an employee that is terminated for any nondiscriminatory reason is entitled to

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164. *See* 29 U.S.C. §§ 621–634 (2000); *id.* § 623(a)(1) (prohibiting discrimination "because of such individual's age").

165. *See* 42 U.S.C. §§ 12101–12213 (2000 & Supp. III 2003); 47 U.S.C. § 225 (2000); 42 U.S.C. § 12112(a) (2000) (prohibiting discrimination "because of the disability of [an] individual").

166. 411 U.S. 792 (1973).

167. *Id.* at 802–03. *McDonnell Douglas* set forth the standard for establishing discrimination through circumstantial evidence of discrimination. This analysis changes when an employee is able to show discrimination through more direct evidence. *See generally* Desert Palace, Inc. v. Costa, 539 U.S. 90 (2003).

168. *McDonnell Douglas*, 411 U.S. at 802.

169. *Id.* Though a hiring case, these elements have been applied to all cases of disparate treatment discrimination, and the fourth prong of the test is modified to fit the facts of the particular case. *See id.* at 802 n.13 ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.").

170. *Id.* at 802.

171. *Id.* at 804.

172. *Id.* at 802–04.

173. Vivant, *supra* note 35, at 98; *see* INT'L LABOR LAW COMM., *supra* note 32, at 3-13; LEFEBVRE, *supra* note 38, at 337.

nothing.[174] An employer that discriminates in France is subject to potential criminal and civil penalties.[175] In the United States, however, employers that discriminate are subject only to possible civil penalties, and there is no mechanism to impose any criminal sanctions for any employer's violation of anti-discrimination laws.[176] Under Title VII,[177] these civil penalties include compensatory and punitive damages, equitable relief (including back pay and front pay), injunctive relief, and attorney's fees.[178]

At-will-employment in the United States is therefore the most significant difference with France's employment structure, which permits only discharge for just cause. As demonstrated above, however, there is an important overlap between the anti-discrimination laws of the two countries. The United States provides an exception to its at-will-employment scheme where the company's employment action is based on the employee's race, color, national origin, religion, sex, age, or disability. France prohibits discrimination on all of these grounds,[179] and its statute goes even further in covering additional protected classes.[180] Though the remedies and enforcement schemes of the two countries vary dramatically, both nations have taken important steps to prevent discrimination on many of the same protected grounds—including the prevention of age discrimination.

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174. *See, e.g.*, Cordray v. 135-80 Travel Plaza, Inc., 356 F. Supp. 2d 1011, 1017–18 (D. Neb. 2005) (entering summary judgment for the employer "providing that the plaintiff takes nothing and her complaint is dismissed with prejudice").

175. *See supra* notes 60–67 and accompanying text (discussing criminal and civil penalties for employment discrimination in France).

176. *See* Gitter, *supra* note 62, at 505 ("[T]he United States imposes civil penalties to redress this type of prejudice in the workplace.").

177. The Americans with Disabilities Act remedial provisions mirror those of Title VII. *See* 42 U.S.C. § 1981a(a)(2) (2000). The Age Discrimination in Employment Act (ADEA) damages provisions differ, however. *See* 29 U.S.C. § 626(b) (2000) (providing damages under the ADEA); *see also* Downey v. Comm'r, 33 F.3d 836, 839 (7th Cir. 1994) ("With respect to remedies, the only difference between the scheme embodied under the ADEA and that under Title VII is that under the ADEA a plaintiff may often recover liquidated damages in addition to lost wages when the employer's violation of the statute has been willful.").

178. *See* 42 U.S.C. § 2000e-5(g) (2000) (providing injunctive and equitable relief for intentional discrimination claims); § 1981a(b) (providing compensatory and punitive damages for intentional discrimination claims only). Statutory limitations exist for the amount of compensatory and punitive damages an employer can be subject to. § 1981a(b)(3). In no event will an employer be liable for over $300,000 in compensatory and punitive damages. § 1981a(b)(3)(D).

179. The French statute does not specifically prohibit discrimination on the basis of color, though it does prohibit discrimination on the basis of race. *See* C. TRAV. art. L122-45 (Fr.), *translated in* BERMANN & KIRCH, *supra* note 66.

180. *See id.*

B. Discrimination on the Basis of Age

Employment discrimination law is a statutorily created exception to the employment-at-will doctrine in the United States.[181] In the early 1960s, Congress debated the Civil Rights Act of 1964, and attempted to determine as a matter of policy how far this exception should extend, and what protections should be afforded to workers in this country.[182] After much debate, it was resolved that employment discrimination on the basis of "race, color, religion, sex, or national origin" should not be permitted.[183] Whether to include age as a basis for protection from discrimination was also considered during the initial debates; however, the age provisions were later omitted.[184] Congress did not walk completely away from the issue, however, and the legislature directed—within the text of the Civil Rights Act—that the Secretary of Labor "make a full and complete study of the factors which might tend to result in discrimination in employment because of age and of the consequences of such discrimination on the economy and individuals affected."[185] It was therefore clear that Congress was openly worried about "arbitrary discrimination in employment because of age."[186]

The Secretary of Labor subsequently issued his report in June 1965, concluding that age discrimination in employment "was a serious national problem" that should be remedied through the enactment of federal law.[187]

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181. *See* McGinley, *supra* note 157, at 1459 ("[E]mployment discrimination law is a very narrow exception to the employment at will doctrine . . . .").

182. *See, e.g.*, Mark R. Azman, Note, *The Development of Title VII Protection for American Citizens Employed Abroad by American Employers: Yesterday, Today and Tomorrow*, 18 WM. MITCHELL L. REV. 531, 531–32 (1992) (noting the "long struggle," which lasted approximately twenty years, to pass the discrimination statute).

183. *See* 42 U.S.C. § 2000e-2(a) (2000).

184. Michael C. Sloan, Comment, *Disparate Impact in the Age Discrimination in Employment Act: Will the Supreme Court Permit It?*, 1995 WIS. L. REV. 507, 511–12 (1995); *see also* Roberta Sue Alexander, Comment, *The Future of Disparate Impact Analysis for Age Discrimination in a Post-*Hazen Paper *World*, 25 U. DAYTON L. REV. 75, 78 (1999) (discussing the debate over whether to include age in the text of Title VII).

185. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 715, 78 Stat. 241, 265 (1964). The Civil Rights Act further required that the Secretary of Labor prepare a report for Congress by June 30, 1965, setting forth the results of the study as well as recommendations for Congressional legislation on age discrimination. § 715, 78 Stat. at 265; *see also* Steven J. Kaminshine, *The Cost of Older Workers, Disparate Impact, and the Age Discrimination in Employment Act*, 42 FLA. L. REV. 229, 235 (1990) (discussing Congress' decision to "defer the age issue" until after receipt of the report from the Secretary of Labor).

186. § 715, 78 Stat. at 265.

187. BARBARA T. LINDEMANN & DAVID D. KADUE, AGE DISCRIMINATION IN EMPLOYMENT LAW 6 (2003) (discussing the report of the Secretary of Labor). The Secretary of Labor's report began quite poetically, noting that Browning wrote on the subject of age by stating, "'The best is yet to be / The last of life, for which the first was made.' A century later, reality has still not caught up with that poetry." W. WILLARD WIRTZ, THE OLDER AMERICAN WORKER: AGE

At the request of Congress, the Secretary of Labor subsequently submitted draft legislation in early 1967 targeted at eliminating age discrimination in the workplace.[188] In January 1967, President Lyndon Johnson sent a message to Congress recommending the enactment of legislation prohibiting discrimination against individuals aged forty-five to sixty-five in the workplace.[189] President Johnson recognized that the economic loss caused by age discrimination was significant, but that "the greater loss is the cruel sacrifice in happiness and well-being, which joblessness imposes on these citizens and their families."[190] Congress ultimately determined that those between the ages of forty and sixty-five deserved protection—creating the upper threshold because it recognized that individuals typically began to receive social security benefits and proceeds from pension plans at this age.[191]

Importantly, Congress also debated whether to include a lower age threshold in the statute.[192] A lower age restriction had been urged by a group of airline stewardesses, some of whom were not permitted to keep their jobs after reaching thirty-two years of age.[193] Congress found their testimony "highly effective and persuasive."[194] Indeed, the situation of these stewardesses demonstrated the "apparent gross and arbitrary employment distinction based on age alone."[195] It was determined, however, that if Congress lowered the protected age below forty, the results would be counterproductive, thereby "lessen[ing] the primary objective; that is, the

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DISCRIMINATION IN EMPLOYMENT (1965), *reprinted in* OFFICE OF THE GEN. COUNSEL, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, LEGISLATIVE HISTORY OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT 19 (1981); *see also* D. Aaron Lacy, *You Are Not Quite as Old as You Think: Making the Case for Reverse Age Discrimination Under the ADEA*, 26 BERKELEY J. EMP. & LAB. L. 363, 367 (2005) (discussing the results of the report from Secretary of Labor).

188. LINDEMANN & KADUE, *supra* note 187, at 7.

189. LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 120.06, at 120-13 (Bender 2d ed. 2004). In the original version of the statute, the protected group included individuals forty to sixty-five. *Id.*

190. Special Message to the Congress Proposing Programs for Older Americans, 1 PUB. PAPERS 37 (Jan. 23, 1967).

191. LINDEMANN & KADUE, *supra* note 187, at 8. Congress determined that it would protect individuals that were forty years of age—rather than forty-five years old as suggested by the President—because forty is "the age at which age discrimination in employment becomes evident." H.R. REP. NO. 90-805, at 6 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2213, 2219.

192. LINDEMANN & KADUE, *supra* note 187, at 7–8.

193. H.R. REP. NO. 90-805, at 6 (1967) *as reprinted in* 1967 U.S.C.C.A.N. 2213, 2219.

194. *Id.*; *see* LINDEMANN & KADUE, *supra* note 187, at 8 (setting forth Congress' debate over whether to lower the age restriction below forty).

195. H.R. REP. NO. 90-805, at 7 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2213, 2219; *see* LINDEMANN & KADUE, *supra* note 187, at 8 (quoting legislative history regarding the debate on whether to lower the age limit in the Age Discrimination in Employment Act).

promotion of employment opportunities for older workers."[196] Congress emphasized that while it was sympathetic to younger workers, the "only reason" that it did not identify younger employees for protection was that it feared a lower age restriction would undermine the "major objective of the bill."[197] Indeed, in certain industries with a higher proportion of older workers, Congress seemed to encourage the hiring of younger employees to achieve a "reasonable age balance in [the company's] employment structure."[198]

Congress went forward with the statute, passing the Age Discrimination in Employment Act of 1967 (ADEA).[199] President Johnson signed the measure into law on December 16, 1967.[200] The express congressional findings set forth in the ADEA emphasized that it was aimed at protecting older workers.[201] These findings provide that "older workers find themselves disadvantaged in their efforts to retain employment" and that unemployment is "high among older workers."[202] Congress made it clear that "the purpose [of the statute was] to promote employment of older persons based on their ability rather than age . . . ."[203] Age discrimination in the United States was finally illegal under federal law. The plain terms of the statute make it illegal for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age."[204] The statute contains no mention, however, of the need to protect those younger than forty from age discrimination.[205]

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196. H.R. REP. NO. 90-805, at 6 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2213, 2219.

197. *Id.* at 7.

198. *Id.* Congress cited the railroad industry as an example of an industry dominated by older employees, where one-sixth of the engineers were at least sixty-five years of age. *Id.*

199. LARSON, *supra* note 189; LINDEMANN & KADUE, *supra* note 187, at 8.

200. LARSON, *supra* note 189.

201. 29 U.S.C. § 621 (2000).

202. *Id.* § 621(a).

203. *Id.* § 621(b).

204. *Id.* § 623(a)(1). The statute contains other prohibitions for an employer as well, also making it illegal "to limit, segregate, or classify his employees . . . because of such individual's age; or to reduce the wage rate of any employee in order to comply with [the statute]." *Id.* § 623(a)(2)–(3). This prohibitive language of the ADEA is almost identical to the prohibitive language of Title VII. *See* Judith J. Johnson, *Semantic Cover for Age Discrimination: Twilight of the ADEA*, 42 WAYNE L. REV. 1, 7–8 (1995) (noting that the operative language of the ADEA was adopted "word-for-word from Title VII"); Sloan, *supra* note 184, at 511 ("[T]he statutory language of the ADEA borrows directly from Title VII.").

205. *See generally* 29 U.S.C. §§ 621–634. Interestingly, in 1975, Congress passed legislation protecting individuals from being discriminated against "on the basis of age" in being considered for "any program or activity receiving Federal financial assistance." 42 U.S.C.

Over the years, the ADEA would be subject to several revisions, including an increase in the breadth of coverage. In 1979, the protections of the ADEA were extended to those who were seventy years old.[206] In the legislative history to this amendment, Congress noted a concern that raising the age ceiling would "reduce employment opportunities for younger workers."[207] Congress wrote the impact on younger employees off as negligible, however, noting that the higher age limits would increase the work force by two-tenths of one percent at most.[208] In 1986, the upper age limit would be completely eliminated, leaving all workers forty and older protected by the statute, with certain exceptions and employer defenses.[209] One revision that would never come, however, would be a *lowering* of the protected age under the statute, and the provisions of the ADEA are still "limited to individuals who are at least 40 years of age."[210]

When enacted, the statute had widespread endorsement, and was not the subject of "partisan politics" or special interest lobbying.[211] Indeed, the statute was passed "[w]ithout much fanfare."[212] This raises the question as to why younger Americans were not pressing their way before Congress to have the age limits reduced so that they would be afforded protections from age discrimination as well. The answer cannot be that this group was unaware of the legislation. As noted, a group of stewardesses testified

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§ 6102 (2000). This prohibition against age discrimination protects individuals of all ages. *Id.*; *see* Tara-Ann Topputo, Note, *Finding a Hole in the ADEA: Allowing a Cause of Action for Age Discrimination Among Employees Within the Age Protected Class*, 29 U. DAYTON L. REV. 169, 173 (2003) (noting that under legislation regarding federal programs or assistance, "both the young and old received protection against age discrimination").

206. LINDEMANN & KADUE, *supra* note 187, at 11. This extension was passed as part of the 1978 amendments to the statute, which became effective on January 1, 1979. *Id.*

207. S. REP. NO. 95-493, at 4 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 504, 507; *see* LINDEMANN & KADUE, *supra* note 187, at 11–12.

208. S. REP. NO. 95-493, at 4 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 504, 507.

209. LINDEMANN & KADUE, *supra* note 187, at 11, 14. The exceptions to the elimination of the upper age limit included firefighters and police officers. *Id.* at 14. For a general discussion of the defenses available to an employer in an ADEA case, see Elena Minkin, Note, *Flourishing Forties Against Flaming Fifties: Is Reverse Age Discrimination Actionable Under the Age Discrimination in Employment Act?*, 48 ST. LOUIS U. L.J. 225, 229 (2003). *See also* Aaron J. Rogers, Note, *Discrimination Against Younger Members of the ADEA's Protected Class*, 89 IOWA L. REV. 313, 321 (2003).

210. *See* 29 U.S.C. § 631(a); *see also* Amy L. Schuchman, Note, *The Special Problem of the "Younger Older Worker": Reverse Age Discrimination and the ADEA*, 65 U. PITT. L. REV. 339, 341 (2004) (discussing coverage of the ADEA).

211. LINDEMANN & KADUE, *supra* note 187, at 8.

212. Matthew H. Hawes & W. Scott Hardy, Morelli v. Cedel*: Ignoring Jurisdictional Limits and Outflanking Congress Towards the Internationalization of the ADEA*, 65 U. PITT. L. REV. 507, 513 (2004) (quoting LAWRENCE M. FRIEDMAN, YOUR TIME WILL COME: LAW OF AGE DISCRIMINATION AND MANDATORY RETIREMENT 15 (1984)) (internal quotation marks omitted).

before Congress expressing their concerns about applying the lower age limit to the airline industry, and Congress found their arguments "highly effective and persuasive."[213] And when the age limits were increased, Congress recognized the possibility that the amendment could result in fewer jobs for younger Americans due to the larger supply of labor.[214] Perhaps if additional witnesses had come forward when the legislation was proposed, or if the youth of this country had staged peaceful protests and lobbied Congress when the amendments were being considered, the lower age limit would have been reduced below forty or completely eliminated.[215] Regardless, by not opposing or attempting to influence this legislation or its amendments, American youth were required to accept the fact that they would be afforded fewer protections in the workplace than older Americans. Ambivalence had led to the chipping away of their employment rights.[216]

VI. THE SUPREME COURT FURTHER RESTRICTS THE PROTECTIONS OF YOUNGER WORKERS

As discussed above, the decades of the 1960s, 1970s, and 1980s saw the enactment of the ADEA and the complete abandonment of the upper limits of age protections. Though these protections were necessary to help protect older workers from discrimination,[217] the legislation did nothing to prohibit age discrimination that might occur against younger workers. Much more recently, however, the Supreme Court weighed in on whether younger workers should be afforded the same protections from age discrimination as older employees.[218] The Court also reassessed how the protections of the

213. H.R. REP. NO. 90-805, at 6–7 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2213, 2219.

214. S. REP. NO. 95-493, at 4 (1977), *as reprinted in* 1978 U.S.C.C.A.N. 504, 507.

215. One notable example of a younger individual challenging the age-bias of the American system involves Stacy Stillman, a twenty-eight-year-old woman who alleged in a lawsuit that her elimination from "the island" on the television show *Survivor* was motivated by producers with a desire for a seventy-two-year-old contestant to prevail. *See* Minkin, *supra* note 209, at 225 (discussing the lawsuit); *see also* Tara Brenner, Note, *A "Quizzical" Look into the Need for Reality Television Show Regulation*, 22 CARDOZO ARTS & ENT. L.J. 873, 874 (2005) (discussing Stillman's lawsuit which "allege[d] producer interference").

216. Interestingly, at least one court has held that an individual who is less than forty would have standing to bring a claim of *retaliation* under the ADEA. *See* Anderson v. Phillips Petrol. Co., 722 F. Supp. 668, 671 (D. Kan. 1989) ("This court finds that any person, whether or not that person is 40 or older who participates in or files an age discrimination charge, is protected under the ADEA from retaliation."). Thus, if an individual were to oppose an act that would be considered retaliatory under the ADEA, they might have a viable claim irrespective of their age.

217. *See* Topputo, *supra* note 205, at 172–74 (discussing the history of age discrimination and the need for statutory protection).

218. *See generally* Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).

ADEA can be enforced generally, and what level of protection age should be given under the law.[219]

For many years, a debate persisted over whether a so-called "reverse age discrimination" claim was cognizable under the ADEA.[220] A reverse discrimination claim in the age context, however, is significantly different from a reverse discrimination claim on other protected bases under Title VII.[221] This is because the ADEA requires that an individual reach forty years of age before attaining standing under the statute.[222] Thus, to have any claim of discrimination under the ADEA—including reverse discrimination—the plaintiff must be at least forty years old to be in the protected class.[223] The plaintiffs alleging such a reverse age discrimination claim would therefore maintain that they were being discriminated against in favor of employees that were *even older*.[224] For example, a forty-five-year-old teacher could allege that she was discriminated against in favor of a fifty-five-year-old instructor who received greater health benefits simply because of her older age. Though instinctively it might seem unlikely that an employer would take an employment action purely on the basis of age to advantage an older worker,[225] such claims are not unusual, particularly in the context of the administration of benefits and retirement plans.[226] Thus, unlike the classic reverse race discrimination case alleging that a white employee was terminated in favor of a black worker,[227] a reverse age discrimination claim requires that both employees be in the same protected

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219. *See generally* Smith v. City of Jackson, 544 U.S. 228 (2005).

220. *See generally* Tracey A. Cullen, Note, *Reverse Age Discrimination Suits and the Age Discrimination in Employment Act*, 18 ST. JOHN'S J. LEGAL COMMENT. 271 (2003) (summarizing cases and discussing opposing views on whether reverse age discrimination should be recognized under the ADEA).

221. *See* Minkin, *supra* note 209, at 226 (noting the "different connotation" of reverse discrimination in age context versus other protected classes).

222. 29 U.S.C. § 631(a)–(b) (2000).

223. *Id.*

224. *See* Lacy, *supra* note 187, at 371 (describing one type of reverse age discrimination as "the right of a younger protected worker to sue his employer because the employer gave preferential employment benefits to someone older because of age").

225. *See* Schuchman, *supra* note 210, at 340 (noting that at first glance "one may intuitively dismiss reverse age discrimination as irrational, absurd, or unintended by Congress").

226. *See, e.g.*, *infra* text accompanying notes 236–39 (discussing factual basis for reverse discrimination claim in *Cline*).

227. *See, e.g.*, Hague v. Thompson Distribution Co., 436 F.3d 816, 822 (7th Cir. 2006) (involving white plaintiffs alleging that they were terminated and replaced with three black workers). Reverse discrimination claims on the basis of sex are also not uncommon, i.e., where a male plaintiff alleges that he was discriminated against in favor of a female employee. *See, e.g.*, Minkin, *supra* note 209, at 226 (noting that male employees have brought reverse discrimination claims under Title VII).

class—over forty—and that an employment action was taken that favored the older worker.[228]

Until 2002, the appellate courts had uniformly rejected the argument that a reverse age discrimination claim could be brought under the statute.[229] In the most notable of these cases, *Hamilton v. Caterpillar, Inc.*,[230] the Seventh Circuit considered a reverse age discrimination claim brought by a group of plaintiffs between the ages of forty and fifty who alleged that an early retirement plan offered only to those over fifty was discriminatory.[231] In rejecting the claim, the court opined that Congress could not have intended to protect younger workers from being given less preferential treatment than older workers, otherwise "limiting the protected class to those 40 and above would make little sense."[232] The court thus declined to "open the floodgates to attacks on every retirement plan," and concluded that reverse age discrimination is not cognizable under the ADEA.[233]

A. General Dynamics Land Systems, Inc. v. Cline: *Reverse Age Discrimination*

Despite the legal conclusion by *Hamilton* and other courts that reverse age discrimination claims were not viable,[234] the legal landscape would soon change when the Sixth Circuit considered *Cline v. General Dynamics Land Systems, Inc.*,[235] a case that would subsequently be appealed to the U.S. Supreme Court.[236]

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228. *See* Schuchman, *supra* note 210, at 340 ("Unlike Title VII, where anyone can sue if discriminated against on the basis of his or her race, color, religion, sex, or national origin, one must be forty or older to invoke the ADEA's protections.").

229. *See* Lacy, *supra* note 187, at 372–75 (discussing court decisions rejecting argument that younger workers have discrimination claims based on employer's treatment of older workers).

230. 966 F.2d 1226 (7th Cir. 1992).

231. *Id.* at 1227.

232. *Id.*; *see also* Paul L. Arrington, Note, *Not Always Protected: Reverse Age Discrimination and the Supreme Court's Decision in* General Dynamics Land Systems, Inc. v. Cline, 73 UMKC L. REV. 543, 554–55 (2005) (discussing the Seventh Circuit's decision in *Hamilton*).

233. *Hamilton*, 966 F.2d at 1228.

234. *See, e.g.*, Minkin, *supra* note 209, at 233–38 (discussing court decisions rejecting reverse age discrimination claims).

235. 296 F.3d 466 (6th Cir. 2002).

236. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).

1. Decision of the U.S. Court of Appeals for the Sixth Circuit

In *Cline*, a group of employees between the ages of forty and forty-nine brought suit against their employer and labor union alleging that a newly negotiated collective bargaining agreement was discriminatory on the basis of age.[237] Under the new agreement, the company no longer had an obligation to afford full health coverage to retirees.[238] An exception to the new agreement, however, provided that workers who were fifty years or older on a specific date would still be provided with full health coverage when they retired.[239] The plaintiffs' suit maintained that this exception violated the ADEA because it discriminated against those between the ages of forty and forty-nine, who were still within the statute's protected age range.[240] The district court granted the company's motion to dismiss, concluding that reverse age discrimination was not cognizable under the ADEA, and that Congress was only concerned with protecting older employees when it passed this age legislation.[241]

The Sixth Circuit Court of Appeals had a very different view of the case than the district court. The Sixth Circuit began—where it should—with the plain language of the ADEA, quoting the text of the statute and emphasizing that "'*any individual*'" is protected from an adverse employment action taken "'because of such individual's age.'"[242] The court reasoned that the ADEA's text and the canons of statutory construction "easily" resolve the case, because the statute "clearly and unambiguously" prohibits a company from distributing benefits on the basis of an employee's age.[243] To hold otherwise, the court opined, would require an "*interpretive* reading of the statute," which is not within the court's province.[244]

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237. *Cline*, 296 F.3d at 467–68.

238. *Id.* at 468.

239. *Id.*

240. *Id. See generally* Lacy, *supra* note 187, at 375–81 (discussing plaintiffs' claims and lower court decisions in *Cline*).

241. Cline v. Gen. Dynamics Land Sys., Inc., 98 F. Supp. 2d 846, 848 (N.D. Ohio 2000); *see also Cline*, 296 F.3d at 468.

242. *Cline*, 296 F.3d at 469 (quoting 29 U.S.C. § 623(a)(1)) (emphasis added by the court). The *Cline* decision garnered three separate opinions: (1) the holding of the court authored by Judge Ryan, *id.* at 467–72; (2) a concurring opinion by Judge Cole, *id.* at 472–76 (Cole, J., concurring); and (3) a dissent by district court Judge Williams, sitting by designation, *id.* at 476–77 (Williams, J., dissenting).

243. *Id.* at 469 (majority opinion).

244. *Id.* In a concurring opinion, Judge Cole agreed that the "plain language" of the statute permits claims of reverse age discrimination. *Id.* at 472 (Cole, J., concurring). He emphasized that there was "no legally acceptable reason [to look] beyond the language of the statute here."

The court further found that the Seventh Circuit's decisions in *Hamilton*, and its progeny,[245] were unpersuasive because they relied too heavily on "generalized language" from the "Statement of Findings and Purpose" in the statute, and disregarded the rule that a court should focus solely on the plain terms of the statute.[246] The court further reasoned that Congress' stated desire "to protect 'older workers' and 'older persons'" in the statute was not inconsistent with the court's reasoning that it is illegal to afford greater benefits to those over fifty than those over forty.[247] As the court noted, the statute is specifically designed to protect those who are forty years of age or older.[248] The court further pointed out that the Equal Employment Opportunity Commission (EEOC), the agency charged with enforcing the ADEA, had interpreted the statute as prohibiting discrimination against younger employees within the protected class to the advantage of older workers.[249] The court found the EEOC's interpretation of the statute to be "a true rendering of the language" of the ADEA.[250] The court concluded its analysis by noting that if Congress had only wanted to protect employees who were "*relatively* older, it clearly had the power and acuity to do so. It did not."[251]

Id. Judge Cole, however, expressed "serious doubts" about whether this result was intended by Congress. *Id.*

245. *See* Minkin, *supra* note 209, at 233–38 (discussing the majority view of circuit courts rejecting claims of reverse discrimination under the ADEA).

246. *Cline*, 296 F.3d at 470; *see also* Minkin, *supra* note 209, at 242 (discussing the Sixth Circuit's criticism of the *Hamilton* decision). The dissent in the case, however, was persuaded by the reasoning in *Hamilton* and further warned that the majority's decision "could have a devastating effect on the collective bargaining process, calling into question the validity of seniority and early retirement programs . . . across the country." *Cline*, 296 F.3d at 476 (Williams, J., dissenting).

247. *Cline*, 296 F.3d at 470. The court also went out of its way to attack the "reverse discrimination" terminology assigned to this type of case, which "has no ascertainable meaning in the law." *Id.* at 471. The court emphasized that "[a]n action is either discriminatory or it is not discriminatory, and some discriminatory actions are prohibited by law." *Id.*

248. *Id. See generally* Lacy, *supra* note 187, at 375–78 (discussing the Sixth Circuit's reasoning in *Cline*).

249. *Cline*, 296 F.3d at 471 (citing 29 C.F.R. § 1625.2(a)).

250. *Id.*

251. *Id.* at 472. The Court also offered the following "syllogism" to summarize the case:

> The ADEA expressly prohibits denying any employee within the protected class an employment benefit solely because of age. The [new collective bargaining agreement] provision in question denies a group of employees within the protected class an employee benefit based solely on their age. Therefore, the ADEA prohibits the [new agreement] provision in question.

Id.

2. U.S. Supreme Court Decision

After the Sixth Circuit's decision in *Cline*, the appellate courts had a clear circuit split on the issue of whether reverse discrimination claims should be permitted under the ADEA.[252] The Supreme Court granted certiorari to resolve this divide.[253] Justice Souter, writing for the majority, began the Court's opinion by noting that "Congress's interpretive clues speak almost unanimously" to a reading of the ADEA that prohibits discrimination "against workers who are older than the ones getting treated better."[254] To support this conclusion, the Court looked to the report of the Secretary of Labor that was commissioned by Congress, noting that the Secretary did not identify any "unfair advantages accruing to older employees at the expense of their juniors."[255] Rather, the report emphasized the monetary advantages employers often have to replace older workers with younger employees.[256]

The Court also referenced the congressional hearings on the statute, noting that the testimony "dwelled on unjustified assumptions about the effect of age on ability to work."[257] Thus, the concern during the hearings was that it is more difficult for a person to find and maintain employment as that person gets older.[258] The Court was further persuaded by the fact that "nothing" in the congressional hearings indicated any concern that employees were worried over "discrimination in favor of their seniors."[259] The Court emphasized that "the statements of purpose and findings" in the statute highlight concerns over barriers in the workplace faced by "older persons," thus expressing a concern about "the effects of age as intensifying over time."[260]

Within this context, the Court concluded that the statutory language prohibiting "'discriminat[ion] . . . because of [an] individual's age'"[261] was targeted at protecting "a relatively old worker from discrimination that

252. *See* Cullen, *supra* note 220, at 280–91 (discussing the existence of a circuit split on the issue of reverse age discrimination claims).

253. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581 (2004).

254. *Id.* at 586.

255. *Id.* at 587; *see* Rebecca L. Ennis, Casenotes, General Dynamics Land Systems, Inc. v. Cline*: Shrinking the Realm of Possibility for Reverse Age Discrimination Suits*, 39 U. RICH. L. REV. 753, 759 (2005) (discussing the Court's reliance on the report of the Secretary of Labor).

256. *Cline*, 540 U.S. at 587.

257. *Id.* at 588.

258. *Id.* at 588–89.

259. *Id.* at 589; *see* Lacy, *supra* note 187, at 381 (noting that the Supreme Court looked to legislative history to conclude that "Congress was concerned with protecting older employees relative to younger employees").

260. *Cline*, 540 U.S. at 589–90.

261. *Id.* at 590 (quoting 29 U.S.C. § 623).

works to the advantage of the relatively young."[262] The Court also noted that "[c]ommon experience" supports this reading of the statute.[263] In this regard, the Court emphasized the traditional notions that favor the youth of our society, stating that:

> One commonplace conception of American society in recent decades is its character as a "youth culture," and in a world where younger is better, talk about discrimination because of age is naturally understood to refer to discrimination against the older . . . . The youthful deficiencies of inexperience and unsteadiness invite stereotypical and discriminatory thinking about those a lot younger than 40, and prejudice suffered by a 40-year-old is not typically owing to youth, as 40-year-olds sadly tend to find out. The enemy of 40 is 30, not 50.[264]

The Court thus saw the forty-year age requirement as a way for Congress to classify the group that was in danger of discrimination in favor of even younger persons, not as a means of identifying a threat of "favoritism toward seniors."[265] The Court further cited to the congressional testimony of the stewardesses[266] that attempted to lower the age requirement for protection under the statute, and the Court noted that even these employees were worried about being discriminated against in favor of younger, rather than older, workers.[267]

The Court also examined the plain meaning of the term "age."[268] The Court noted that, on its face, the word "age" can have either of two different meanings: (1) the length of time that an individual has lived, or (2) as a form of "shorthand for the longer span and concurrent aches that make youth look good."[269] The Court acknowledged that the ADEA contains a defense for an employer where age is shown to be "'a bona fide occupational qualification'" of the job.[270] In this context, the word "age"

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262. *Id.* at 590–91.

263. *Id.* at 591.

264. *Id.* (citing H.R. REP. NO. 90-805, at 6 (1967)); *see* Ennis, *supra* note 255, at 759–60 (discussing the Court's analysis and noting that it "couched its conclusion in terms of social history").

265. *Cline*, 540 U.S. at 591–92.

266. *Id.* at 591; *see supra* text accompanying notes 192–95 (discussing the legislative history of the ADEA and summarizing the testimony of the stewardesses).

267. *Cline*, 540 U.S. at 591. The Court also pointed to the near unanimity of opinion in the federal courts that reverse discrimination is not viable under the ADEA. *Id.* at 593–94. This unified opinion of the federal courts "is enough to rule out any serious claim of ambiguity." *Id.*

268. *Id.* at 594–98.

269. *Id.* at 596.

270. *Id.* at 595 (quoting 29 U.S.C. § 623(f)). The defense states that it is not unlawful to "take any action otherwise prohibited . . . where age is a bona fide occupational qualification

clearly means the number of years that an individual has lived.[271] However, the Court rejected the argument that this same meaning of the term must be imported to the prohibition against discrimination "'because of [an] individual's age.'"[272] Rather, the Court concluded that the term "age" as used in the statute's operative prohibitory language means "old age."[273] This conclusion is supported by the "social history" of discrimination in our society against relatively older workers as well as the legislative record.[274]

The Court also dismissed the statements in the congressional record by Senator Yarborough suggesting that a reverse age discrimination claim would be viable where he stated that "[t]he law prohibits age being a factor in the decision to hire, as to one age over the other, whichever way [the] decision went."[275] The Court considered this a "single outlying statement" which should not be relied upon.[276] Finally, the Court indicated that it was not persuaded by the fact that the EEOC had issued regulations suggesting the viability of a reverse age discrimination claim.[277] The Court found the agency's interpretation of the statute to be "clearly wrong."[278] Thus, the Supreme Court, relying on the "text, structure, purpose, and history" of the statute, concluded that the ADEA does not prohibit "an employer from favoring an older employee over a younger one," and reversed the decision of the Sixth Circuit.[279]

Justice Scalia dissented from the opinion, arguing that deference should have been afforded to the EEOC's interpretation of the statute, which he believed was not "unreasonable."[280] Noting that the statute did not unambiguously preclude a reverse discrimination claim, Justice Scalia found it appropriate to "defer to the agency's authoritative conclusion."[281]

Justice Thomas, joined by Justice Kennedy, filed a separate dissenting opinion, noting that "[t]his should have been an easy case."[282] Justice

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reasonably necessary to the normal operation of the particular business, or where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1) (2000).

271. *Cline*, 540 U.S. at 596–97.

272. *Id.* at 595–96 (quoting 29 U.S.C. § 633(a)(1)).

273. *Id.* at 596.

274. *Id.*

275. *Id.* at 598 (quoting 113 CONG. REC. 31255 (1967)). The statement was in response to a question from another senator asking whether it would be illegal to hire a forty-two-year-old instead of a fifty-two-year-old employee based solely on the age of the younger worker. *Id.*

276. *Cline*, 540 U.S. at 598–99.

277. *Id.* at 599–600.

278. *Id.* at 600.

279. *Id.*

280. *Id.* at 601 (Scalia, J., dissenting).

281. *Id.* at 602.

282. *Id.* (Thomas, J., dissenting).

Thomas focused on the plain language of the statute, arguing that this language required the conclusion that claims should be permitted "by the relatively young when discriminated against in favor of the relatively old."[283] Justice Thomas emphasized that the prohibition against discriminating "because of such individual's age" was not limited to "discrimination because of relatively *older* age."[284] In contrast to the opinion of the majority, Justice Thomas emphasized that it is common use of the term discrimination to mean that an employer terminated an employee solely because the worker was under forty-five.[285] Indeed, it would be a "struggle" to find any other phrase to describe such an employment action.[286]

Justice Thomas further noted the ambiguity of the word "age" in the statute, and argued for a consistent application of the term throughout the ADEA.[287] To maintain that the term "age" in the bona fide occupational defense means "older age" would make this provision "incoherent."[288] Because the term "age" in this defense must mean "chronological age," then, Justice Thomas maintained that the term should be similarly interpreted in the statute's text prohibiting discrimination.[289] This consistent application of the term age would therefore support the conclusion that discrimination claims brought by relatively younger workers should be permitted.[290] Like Justice Scalia, Justice Thomas also relied upon the EEOC's interpretation of the statute, noting that "it strains credulity to argue that such a reading is so unreasonable that an agency could not adopt it."[291]

Finally, Justice Thomas criticized the majority's decision, which "[s]trangely" failed to "explain why it departs" from the plain meaning of the statutory text.[292] Justice Thomas was not persuaded that the Court should examine the "social history" of the statute in the face of the ADEA's clear

283. *Id.* at 602–03; *see* Lacy, *supra* note 187, at 382 (discussing Justice Thomas's dissent and noting the emphasis placed on the "unambiguous" statutory text).

284. *Cline*, 540 U.S. at 603 (Thomas, J., dissenting) (quoting 29 U.S.C. § 623(a)(1)).

285. *Id.*

286. *Id.*

287. *Id.* at 603–04; *see* Ennis, *supra* note 255, at 761 (discussing Justice Thomas's use of the word "age" in his dissent).

288. *Cline*, 540 U.S. at 604 (Thomas, J., dissenting).

289. *Id.*

290. *Id.* at 603–05.

291. *Id.* at 606. Justice Thomas also pointed to the legislative record, and noted that the only relevant portion supports his reading of the statute. *Id.* In this regard, Senator Yarborough "confirmed that the text really meant what it said." *Id.*

292. *Id.*

plain language.[293] Justice Thomas therefore disagreed with the majority's holding and reasoning, and would have upheld the decision of the Sixth Circuit.[294]

3. Lessons from *Cline* and the American Reaction

The Supreme Court's decision in *Cline* made clear that the age protections of the anti-discrimination statutes were intended for older, rather than younger, employees. The majority emphasized that there was "nothing" in the congressional hearings indicating any concern that employees were worried over "discrimination in favor of their seniors."[295] The Court went out of its way to emphasize that American society favors a "youth culture" where "younger is better," and that discrimination in this country is obviously targeted "against the older."[296] At the same time, the Court acknowledged that discrimination can occur against the young based on an employer's stereotypical perceptions of "youthful . . . inexperience and unsteadiness."[297] The Court further highlighted that the "social history" of discrimination against relatively older workers supported its conclusion.[298]

In limiting the claims that can be brought by relatively younger workers, the Court simply ignored the plain meaning of the statutory text. The majority instead read "social history" and American culture into the statute, a result Justice Thomas warned will lead the Court "far astray from well-settled principles of statutory interpretation."[299] At a minimum, then, the Court's analysis can be said to be a strained reading of the ADEA. So what was the reaction of younger workers in this country to this controversial decision which explicitly limited their employment protections on the basis of age? Similar to the reaction of American youth to the passage of the ADEA—which gave employees under forty *no* protections from age discrimination—the Supreme Court's decision to further restrict the rights of younger workers did not cause any noticeable response among young Americans. The news reports of the decision are simply devoid of any

293. *Id.* at 606–07. Justice Thomas notes that the majority did not explain the meaning of "social history," though the term "is apparently something different from legislative history, because the Court refers to legislative history as a separate interpretive tool in the very same sentence." *Id.* at 607.

294. *Id.* at 613.

295. *Id.* at 589 (majority opinion).

296. *Id.* at 591.

297. *Id.*

298. *Id.* at 596.

299. *Id.* at 612 (Thomas, J., dissenting).

mention of outrage by younger workers.[300] This is true even though millions of American workers are in the protected age group and were therefore directly impacted by the decision.[301] And, through the passage of time, those employees that are younger than forty will also be impacted by the decision during the course of their careers.

This lack of concern by American youth over the further reduction of employment protections based solely on age is startling when compared with the French reaction to the Constitutional Council's decision. Presented with an almost identical question of reverse age discrimination, France's Constitutional Council ruled that it did not violate the French Constitution to afford greater protections to older workers than younger employees.[302] Unlike the lack of reaction by American youth to the U.S. Supreme Court, however, youth in France immediately took notice of the Constitutional Council's decision, resulting in widespread protests.[303] Continued protests in the days following the French decision would result in the government abandoning its youth employment law.[304] The failure to respond to the Supreme Court's decision in the United States, however, meant that American youth had accepted the additional erosion of their employment rights while older Americans maintained their protections. Complacency comes with a cost.

B. Smith v. City of Jackson*: Limiting Age Protections*

In *Smith v. City of Jackson*,[305] the Supreme Court continued to erode the protections afforded to employees on the basis of age. Though not directly focused on the rights of younger workers, the Court's recent decision has implications for *all* workers alleging age discrimination. In *Smith*, the Court

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300. *See, e.g.*, Stephen Henderson, *Older Workers May Have Extra Benefits, Court Says*, PHILA. INQUIRER, Feb. 25, 2004, at A2 (discussing implications of *Cline* and noting that pension and benefits packages that "draw age distinctions" are not actionable under the Court's reasoning); Tom Ramstack, *Better Benefits for Older Workers Upheld: Court Says Age-Bias Laws Not Meant for Young*, WASH. TIMES, Feb. 25, 2004, at C8 (discussing the Court's decision and noting that younger employees are not protected); *Court Halts Age-Bias Case: Younger Workers Cannot Sue if Older Colleagues Receive Better Treatment*, RICHMOND TIMES DISPATCH, Feb. 25, 2004, at C1 (noting that under the Court's decision "[a]ge has its benefits").

301. *See, e.g.*, Ramstack, *supra* note 300, at C8 (noting that roughly half of the American work force is forty or older — approximately seventy million employees).

302. *See supra* Part III (discussing the Constitutional Council's decision upholding constitutionality of youth employment law).

303. Smith, *supra* note 13.

304. *See supra* text accompanying note 18 (discussing French government reaction to student protests).

305. 544 U.S. 228 (2005).

considered whether workers covered by the ADEA could bring a claim of disparate-impact (or unintentional) discrimination.[306] The plaintiffs, employees of a city police department, maintained that their employer's pay scale had a discriminatory impact against older workers because younger police officers received higher percentage salary increases than older officers.[307] Thus, the question before the Court was whether plaintiffs could even bring a disparate-impact claim.[308]

Prior to the Court's decision, the appellate courts were split on the issue of whether an unintentional discrimination claim was even viable under the ADEA.[309] Justice Stevens, writing for a plurality, concluded that disparate-impact claims on the basis of age can be properly brought under the statute.[310] In reaching this conclusion, the plurality pointed out that the language of the ADEA mirrors the language of Title VII authorizing disparate-impact litigation.[311] In this regard, it is illegal for an employer to "limit, segregate, or classify his employees" on the basis of "race, color, religion, sex . . . national origin," *or* "*age*."[312] Because the two statutes contain this same language,[313] then, they should be interpreted consistently to recognize disparate-impact claims.[314]

The Court further considered whether the provision in the ADEA that makes it lawful for an employer to take an "otherwise prohibited" employment action "where the differentiation is based on reasonable factors other than age discrimination" (RFOA) prohibits disparate-impact claims under this statute.[315] The plurality concluded that the RFOA defense was

306. *Id.* at 230.

307. *Id.* at 231.

308. *Id.* at 230.

309. *Id.* at 237 n.9 (summarizing circuit split).

310. *Id.* at 232.

311. *Id.* at 233. The Supreme Court recognized disparate impact as a viable theory of discrimination under Title VII of the Civil Rights Act of 1964 in *Griggs v. Duke Power Co.*, 401 U.S. 424, 436 (1971).

312. *Smith*, 544 U.S. at 233 (emphasis added) (quoting 29 U.S.C. § 623 (2000) and 42 U.S.C. § 2000e-2(a)(2) (2000)) (internal quotation marks omitted).

313. *Id.* at 233–34.

314. *Id.* at 236 ("*Griggs*, which interpreted the identical text at issue here, thus strongly suggests that a disparate-impact theory should be cognizable under the ADEA."). The Court was similarly persuaded that the legislative history supported the conclusion that disparate-impact theory is viable under the statute. *Id.* at 232.

315. *Id.* at 238 (quoting Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, § 4, 81 Stat. 602, 603 (1967) (codified as amended at 29 U.S.C. § 623) (internal quotation marks omitted); *see* 29 U.S.C. § 623(f). "It shall not be unlawful for an employer, employment agency, or labor organization— (1) to take any action otherwise prohibited . . . where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentiation is based on *reasonable factors other than age* . . . ." 29 U.S.C. § 623(f) (emphasis added).

consistent with disparate-impact theory because "the RFOA provision plays its principal role [in unintentional discrimination cases] by precluding liability if the adverse impact was attributable to a nonage factor that was 'reasonable.'"[316] Thus, Congress' inclusion of this defense into the statute "actually supports" the conclusion that it intended disparate-impact claims to be viable under the ADEA.[317] The plurality also looked to the regulations of the Department of Labor and EEOC, both of which "consistently interpreted" the statute to permit disparate-impact claims.[318] Based on the statutory text, legislative history, and agency interpretations, the Court concluded that disparate-impact claims should be permitted in cases of age discrimination.[319]

Though seemingly an employee-friendly decision on its face, the Court did not end with this analysis and continued its opinion by exploring the reasons why disparate-impact claims under the ADEA are "narrower than under Title VII," pointing specifically to the RFOA provision.[320] The Court concluded that unlike disparate-impact analysis under Title VII, the "reasonableness inquiry" under the ADEA does not require a determination of whether there are other ways to achieve the employer's goals that have less impact on the protected group.[321] Rather, any factor that an employer uses to achieve its business goals is acceptable as long as it is "reasonable" and not based on age.[322] Turning to the specific facts of the case, the Court examined the city's stated justification for giving younger workers larger percentage pay increases than older workers—the city's desire to make less senior officers' salaries competitive with other positions in the relevant labor market.[323] The Court found this justification "unquestionably reasonable," and therefore rejected the plaintiffs' claims.[324]

In a concurring opinion, Justice Scalia supported the Court's judgment, but instead emphasized that he would defer to the EEOC's interpretation of

316. *Smith*, 544 U.S. at 239.

317. *Id.*

318. *Id.* at 239–40 (citing 29 C.F.R. § 860.103(f)(1)(i) (1970) and 29 C.F.R. § 1625.7 (2004)).

319. *Id.* at 232–33, 240; *see* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 748 (2006) (noting that the Supreme Court recognized disparate-impact theory under the ADEA in *Smith*).

320. *Smith*, 544 U.S. at 240.

321. *Id.* at 243.

322. *See id.* at 242.

323. *Id.*

324. *Id.*

the statute, which permits disparate-impact claims.[325] Justice O'Connor, joined by Justices Kennedy and Thomas, concurred in the Court's decision rejecting the plaintiffs' claims, but only on the grounds that disparate impact should not be recognized as a viable theory under the ADEA.[326] Justice O'Connor further noted that while she disagreed with the recognition of disparate-impact claims under the ADEA, these claims, if allowed, should be "strictly circumscribed by the RFOA exemption."[327] Therefore, where the employer has asserted a factor "rationally related to some legitimate business objective," it should escape liability for a disparate-impact ADEA claim.[328]

Thus, while the Supreme Court recognized the existence of disparate-impact claims under the ADEA, the Court was clear that such claims are extremely limited.[329] Even if plaintiffs are able to demonstrate that an employer's policy results in a disparate impact on the basis of age, the policy will still be upheld if it was implemented for a "reasonable" rationale[330] or is "rationally related to some legitimate business objective."[331] It would certainly not be difficult for an employer to identify *some* rationale to justify a discriminatory policy that would meet this extremely low threshold. Indeed, most employment decisions—whether discriminatory or not—can be justified by monetary concerns.

Despite the effect this decision will have limiting the potential relief for all victims of age discrimination, the *Smith* decision also failed to generate any significant controversy in the United States. The limited press coverage of the decision tended to emphasize that workers will have greater, rather than reduced, protections under the ADEA.[332] These articles focus primarily

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325. *Id.* at 243 (Scalia, J., concurring); *see also* Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1948 n.70 (2006) (discussing the plurality's limited consideration of deference to the EEOC's argument in *Smith*).

326. *See Smith*, 544 U.S. at 247–68 (O'Connor, J., concurring).

327. *Id.* at 267.

328. *Id.*

329. *See* Charles A. Sullivan, *Disparate Impact: Looking past the* Desert Palace *Mirage*, 47 WM. & MARY L. REV. 911, 974 n.260 (2005) (discussing the Supreme Court's limitation of disparate-impact claims on the basis of age under *Smith*).

330. *Smith*, 544 U.S. at 242–43.

331. *Id.* at 267 (O'Connor, J., concurring).

332. *See, e.g.*, Charles Lane, *What's Good for Gosling Isn't Always Good for Gander, Top Court Says*, PITTSBURGH TRIB. REV., Mar. 31, 2005 (noting that the "Supreme Court made it easier to sue for age discrimination" but that such claims "should be more limited than racial-discrimination lawsuits"); David G. Savage, *Justices Give Older Workers More Leeway in Alleging Bias*, L.A. TIMES, Mar. 31, 2005, at 1 (stating that the Court "gave workers age 40 and older greater rights to sue an employer for age discrimination, even if there was no evidence that such bias was intentional" and noting the employer defense); Hope Yen, *Ruling Supports Older*

on the Supreme Court's recognition of disparate impact as an available theory under the ADEA, only secondarily noting that the employer will almost always have an iron-clad defense to these actions.[333] Again, like the failure of the youth of this country to react to the Supreme Court's decision in *Cline*,[334] employees of all ages have remained seemingly indifferent to the reduction of their employment protections. Ambivalence as to the level of protections afforded to age discrimination in the United States continues to persist.

C. Other Protections for Younger Workers

Though the ADEA and the Supreme Court have done little, if anything, to provide protections to the younger employees in the American workforce, it is worth briefly noting that other protections sometimes exist. In this regard, while most states have adopted language similar to the ADEA, New Jersey has enacted a statute permitting discrimination claims brought by younger workers.[335] The state's law broadly provides that "[a]ll persons shall have the opportunity to obtain employment . . . without discrimination because of . . . age."[336] Because the law does not restrict discrimination claims on the basis of a particular age, the New Jersey Supreme Court has interpreted the statute as permitting discrimination claims "based on youth."[337] Thus, at least one state has taken action to prohibit the overt discrimination against youth based solely on their age,[338]

Workers, MIAMI HERALD, Mar. 31, 2005, at 1C (stating that the Court's decision "expanded job protections for roughly half the nation's workforce" and also noting employer defense).

333. *See* sources cited *supra* note 332.

334. *See supra* Part VI.A.3 (discussing reaction of American youth to the Supreme Court's decision in *Cline*).

335. N.J. STAT. ANN. § 10:5-4 (West 2006); *see* Jeffrey Paul Fuhrman, *Can Discrimination Law Affect the Imposition of a Minimum Age Requirement for Employment in the National Basketball Association?*, 3 U. PA. J. LAB. & EMP. L. 585, 603–05 (2001) (discussing New Jersey's broad prohibition on age discrimination and how it differs from the great majority of other state laws on age discrimination); *see also* N.J. STAT. ANN. § 10:5-12(a)–(e) (West 2006) (restricting additional employment decisions from being made on the basis of age).

336. N.J. STAT. ANN. § 10:5-4.

337. Bergen Commercial Bank v. Sisler, 723 A.2d 944, 957 (N.J. 1999) ("We hold that the [statute's] prohibition against age discrimination is broad enough to accommodate [plaintiff's] claim of age discrimination based on youth . . . . Because the [statute] contains no such express [age] limitation, our decision rests on our independent assessment of the language and purpose of [the act]."); *see* Fuhrman, *supra* note 335, at 604–05 (discussing the New Jersey Supreme Court's decision in *Sisler*).

338. *See Sisler*, 723 A.2d at 957 (permitting younger workers to bring age discrimination claims). *See generally Employment Discrimination—Youth-Based Termination—an Employee Age Discrimination Claim Based on Youth Is Cognizable Under the New Jersey Law Against*

and certain other states have acted to recognize "reverse age discrimination claims between members of the respective protected classes."[339] However, despite being afforded some protections in individual states, youth have not enjoyed consistent protections at the state level.[340] And, the Supreme Court's interpretation of the ADEA in *Cline* to prohibit reverse age discrimination claims may ultimately have a negative impact on the way the state courts view the age protections given to younger workers—particularly where the state statute involves language similar to the ADEA.

Additionally, younger workers might be able to pursue reverse age discrimination claims under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[341] Under the Equal Protection Clause, persons that are "similarly situated will be dealt with in a similar manner" through the requirement that "government classifications [must] relate to proper governmental purposes."[342] Though age discrimination claims brought pursuant to the Equal Protection Clause appear to have significant potential, such claims have not been well received by the Supreme Court,[343] which does not view age as a suspect classification.[344] Additionally, any

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Discrimination and Appropriately Evaluated Under a Heightened Reverse-Discrimination Standard—Bergen Commercial Bank v. Sisler, 157 N.J. 188, 723 A.2d 944 (1999), *Surveys of Recent Developments in New Jersey Law*, 30 SETON HALL L. REV. 682 (2000) (discussing the New Jersey Supreme Court's decision in *Sisler*).

339. Megan Jordan Strickland, Note, *The Impact of Interpretation: The Age Discrimination in Employment Act as Determined by the Sixth Circuit*, 28 SETON HALL LEGIS. J. 197, 208–09 (2003); *see also* Cline v. Gen. Dynamics Land Sys. Inc., 296 F.3d 466, 474–75 (6th Cir. 2002) (Cole, J., concurring) (discussing state law protections for younger workers), *rev'd*, 540 U.S. 581 (2004).

340. *See* Fuhrman, *supra* note 335, at 605 (noting that there has been "no advance" of youth age protections in other states that is "as significant as New Jersey's," but noting that California may have opened the door to possible reverse discrimination claims); Strickland, *supra* note 339, at 208 (noting that the success of reverse age discrimination claims is limited to "a few select states").

341. *See* Fuhrman, *supra* note 335, at 606–09 (discussing use of the Equal Protection Clause in attacking reverse age discrimination); Barry Bennett Kaufman, Note, *Preferential Hiring Policies for Older Workers Under the Age Discrimination in Employment Act*, 56 S. CAL. L. REV. 825, 849 (1983) ("[T]he equal protection clause [sic] of the fourteenth amendment [sic] has served as the primary device for constitutional attacks on age discrimination."); *see also* LARSON, *supra* note 189, § 120.03, at 120-9 (noting that prior to the passage of the ADEA, claims of age bias were pursued primarily through "constitutional attacks").

342. Kaufman, *supra* note 341.

343. *Id.* at 853 ("[T]he [Supreme] Court has recognized that the use of age to differentiate between groups of people will often be 'reasonable,' and that the reasonableness of such classifications ordinarily will suffice to sustain them against an equal protection challenge."). *But see* Fuhrman, *supra* note 335, at 608–09 (discussing a successful equal protection age discrimination claim in a federal district court case).

344. Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 83 (2000) ("[A]ge is not a suspect classification under the Equal Protection Clause."). Unlike age, the Court has determined that

equal protection challenges would be limited to cases involving governmental actors, such as claims brought against public employers.[345] Similar to the French Constitutional Council's rejection of a constitutional challenge to the validity of the employment law favoring older workers, then, plaintiffs have also had limited success pursuing age claims under the Constitution of the United States.[346]

Thus, younger employees may have some additional protections from age discrimination under state law and the Equal Protection Clause of the U.S. Constitution. Such protections appear extremely limited, however, and do not provide younger workers with any widespread relief.

VII. UNDERSTANDING THE LACK OF REACTION OF AMERICAN YOUTH

The past four decades have seen the enactment of legislation granting significantly greater protections to older workers in the United States. The Supreme Court has also acted to restrict the protections available to younger workers. The youth of this country have allowed this legislation and these decisions to go unchallenged. When juxtaposed against the hostile reaction in France to a similar law limiting the rights of younger workers,[347] the failure of youth to act in this country shows signs of complacency on the part of these Americans. Indeed, the First Job Contract in France—which only limited the rights of workers twenty-six and younger[348]—had an arguably less dramatic impact on the rights of younger workers than the ADEA,[349] which afforded protections only to Americans age forty and older. Is the explanation for the disparate reaction to these laws that the youth of this country agree with Justice Souter that American society values a "youth culture," perceiving that "younger is better,"[350] and are therefore more willing to accept greater protections being given to older workers who arguably need them more? Do younger Americans agree that older workers

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race is a suspect classification. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 228 (1995) ("By requiring strict scrutiny of racial classifications, we require courts to make sure that a governmental classification based on race . . . is legitimate, before permitting unequal treatment based on race to proceed.").

345. Fuhrman, *supra* note 335, at 606–08 (discussing "government action" requirement of the Equal Protection Clause).

346. *See supra* Part III (discussing the French Constitutional Council's analysis of the First Job Contract).

347. *See supra* text accompanying notes 4–18 (discussing French youth reaction to the First Job Contract).

348. *See* Moore, *supra* note 6.

349. *See supra* Part V.B (discussing passage and protections of the ADEA).

350. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 591 (2004).

are entitled to additional protections because they suffer from "concurrent aches that make youth look good?"[351]

The question of why younger Americans more idly accept legislation and Court decisions restricting their rights than their French counterparts can obviously be debated. I believe, however, that there are three primary differences between American society and French society that account for these different reactions. More specifically: (1) younger Americans have not suffered from the persistently high unemployment rates endured by French youth, (2) younger Americans do not have an active collective voice like their French counterparts, and (3) American youth do not have the history of success in protesting governmental action that encourages dissent like the French youth. I will examine each of these considerations in turn.

A. Unemployment Rate

As previously discussed, French youth have suffered from an extremely high unemployment rate for decades.[352] Unemployment of men aged fifteen to twenty-four stood at 22.1% in 1984, and was 30.2% for women in the same age category.[353] Despite the government's repeated efforts to address this problem over the years,[354] the unemployment rate among French youth is still around 22%.[355]

American youth have been much more fortunate, however, and have remained employed in far greater numbers over the past few decades. For example, in June 1974, young American adults between the ages of twenty and twenty-four had an unemployment rate of only 9.3%.[356] In 2005, the American unemployment rate for young adults in the same age group stood even lower at 8.8%.[357] Thus, in recent years, young Americans have

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351. *Id.* at 596.

352. *See supra* Part IV (discussing high unemployment among French youth and governmental reaction).

353. DESPAX & ROJOT, *supra* note 40, at 29 tbl.9.

354. *See supra* text accompanying notes 124–26 (discussing specific governmental action taken to alleviate French unemployment among younger workers).

355. Galloni, *supra* note 19.

356. LARSON, *supra* note 189, § 120.02, at 120-6 (citing Bureau of Labor statistics). The national unemployment rate average in June, 1974 was 4.9%. *Id.* at 120-5.

357. BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY AGE, SEX, AND RACE, http://www.bls.gov/cps/cpsaat3.pdf (last visited Oct. 20, 2006). The average national unemployment rate in 2005 in the United States for persons sixteen and older was 5.1%. *Id. See generally* Robert Kaestner, *The Effect of Government-Mandated Benefits on Youth Employment*, 50 INDUS. & LAB. REL. REV. 122 (1996) (discussing the effect of government-mandated

experienced an unemployment rate that is approximately only one-half of the unemployment rate of their French counterparts.[358] The consistently lower unemployment rate for younger Americans inherently provides a better social climate for this group of workers. As American youth have not had the same difficulty breaking into the labor market as employees in France, there is not the same level of general frustration and resentment against older generations. Indeed, younger workers in France must watch helplessly as their elders reap the many benefits of employment in the country—including guaranteed pensions, short work days, and protections against discipline and discharge.[359] Such persistent unemployment can have both a negative psychological and physical effect on these individuals.[360]

American youth, while enjoying a relatively low unemployment rate, also benefit from certain advantages in the American labor market as compared to older workers. In this regard, while younger Americans are unemployed at a higher rate than older Americans, they also remain unemployed for a *shorter* period of time.[361] For example, young adults between the ages of twenty and twenty-four remain unemployed for an average of fifteen weeks, while those between the ages of forty-five and fifty-four are unemployed for an average of twenty-five weeks.[362] Due to the longer period of time that it takes to find another job, then, unemployment has a more significant financial impact on older individuals in the United States.[363] Cognizant of this fact, American youth are less likely to become frustrated or envious of older workers when they find themselves out of a job.

In addition to having an easier time finding employment than their French counterparts, young Americans also enjoy an economic system that is far wealthier than the one in France.[364] France's per capita gross domestic

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employer-provided benefits on the rate of employment among young adults in the United States).

358. *See* David Neumark & William Wascher, *Minimum Wages, Labor Market Institutions, and Youth Employment: A Cross-National Analysis*, 57 INDUS. & LAB. REL. REV. 223, 230 tbl.2 (2004).

359. *See supra* Part II (discussing structure of French workforce, employment laws and benefits).

360. Philip Harvey, *Human Rights and Economic Policy Discourse: Taking Economic and Social Rights Seriously*, 33 COLUM. HUM. RTS. L. REV. 363, 398–99 (2002).

361. LARSON, *supra* note 189, § 120.02, at 120-7.

362. *Id.* at 120-6 n.3 (citing September 2003 data from the Bureau of Labor Statistics).

363. *Id.* at 120-7. The difficulty older workers have finding other employment arises from a variety of different reasons, including that "the older worker is less able to change either locality or line of work, and in addition may encounter outright age discrimination in many occupations." *Id.*

364. *See* Fisher & Lenglart, *supra* note 45, at 186–87 (comparing the economies of the United States and France).

product is approximately 50% lower than that of the United States.[365] This overall culture of wealth in the United States provides both additional employment opportunities and a sense of security to younger Americans.[366] And, those youth that are unemployed in the United States are far more likely to be able to tap into the country's wealth by relying upon assistance from older generations while they seek other jobs.

In sum, the consistently high unemployment rate among youth in France leads to a simmering of frustrations in that country that predictably comes to a boil when younger workers perceive that the government is attempting to strip them of additional rights on the basis of their age. American youth, however, enjoy far lower unemployment and a society with more significant economic resources, making young Americans less likely to become concerned when the courts or legislature act to take away age-based protections.

B. Lack of a Unified Voice

Another significant difference between the two countries is that the labor unions in France are far more powerful than they are in the United States.[367] Indeed, in France, where the right to unionize is guaranteed by the constitution,[368] "unions often negotiate terms of employment for entire companies or even industries."[369] In the United States, union power has dwindled in recent years. Union membership fell from almost 35% of American workers in 1954 to 16% by 1991.[370] Census data reveals that current union membership has fallen even further, and at present only 13% of wage and salary employees—or about 15.8 million workers—have joined a union in the United States.[371] And, while a greater percentage of

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365. *Id.* at 186.

366. Indeed, the fact that "the United States has considerably fewer legal restrictions on corporations than does France" may also create flexibility in the labor market enabling American companies to hire younger workers. *Id.* at 187.

367. *See supra* Part II.A (discussing the significant role of union membership in the French labor market).

368. *See* DICKSON, *supra* note 32, at 189 (discussing constitutional right to unionize); LEFEBVRE, *supra* note 38, at 357–59 (discussing employee union rights under French labor law).

369. *Union Power Redux*, SAN JOSE MERCURY NEWS, Feb. 26, 2006; *see also* INT'L LABOR LAW COMM., *supra* note 32, at 3-26.

370. Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819, 1819 n.2 (1992).

371. Press Release, U.S. Census Bureau, Facts for Features (Aug. 6, 2004), *available at* http://www.census.gov/Press-Release/www/2004/cb04-ff13-02.pdf.

American workers actually belong to unions than French employees,[372] the American unions do not appear to be as powerful as those in France,[373] which often negotiate collective bargaining agreements for non-union members.[374] Indeed, it has been estimated that the French government extends union and employer agreements to approximately 90% of employees in the country.[375] And, as demonstrated by the recent riots, French youth themselves enjoy representation by powerful student unions.[376]

Thus, unlike their French counterparts, American youth do not have a readily available nationally recognized collective voice for expressing their concern over pressing issues. The lack of a student-based union infrastructure—or a national union willing to come to the aid of youth—makes it difficult for American students to quickly organize in response to governmental action. And, without any powerful unions backing American youth, there are no leaders to go before congressional representatives to express their concerns over proposed legislation. For example, when it passed the ADEA, Congress acknowledged that while it was sympathetic to younger employees, the "only reason" it did not identify younger workers for protection was that it feared a lower age limit would undermine the "major objective of the bill."[377] No union activists attempted to change the bill's "major objective," however, to target discrimination against *all* workers on the basis of age. The lack of a unified student voice would thus assure that the statute's protections were only afforded to older workers.

The lack of a collective voice for young Americans is likely derived from the cultural sense of individuality idealized in this country.[378] This

372. *See Union Power Redux*, *supra* note 369 ("[T]he United States surprisingly has a higher ratio of union membership in its labor force than France.").

373. *See* Fuller, *supra* note 145 ("Unions in France appear to wield greater power than their numerical strength, labor specialists say, because they receive widespread attention in the French media, and the small minority of unionized workers, mainly in the public sector, strike relatively often.").

374. DICKSON, *supra* note 32, at 190–91 (discussing the power of unions in the French workplace).

375. Fuller, *supra* note 145 (discussing the power of unions in France). Interestingly, the relative power of French unions is also an inherent weakness. Because unions are able to negotiate agreements on behalf of non-union members, there becomes less incentive for French workers to become unionized. *Id.*

376. *See, e.g.*, Moore, *supra* note 19 (noting that student unions urged their membership to "stick to plans for protest marches in Paris"); Smith, *supra* note 14 (discussing demands of student and union leaders that labor law be withdrawn).

377. H.R. REP. NO. 90-805, at 7 (1967), *as reprinted in* 1967 U.S.C.C.A.N. 2213, 2219.

378. *See, e.g.*, Gary Apfel, *Whose Constitution Is It Anyway? The Authority of the Judiciary's Interpretation of the Constitution*, 46 RUTGERS L. REV. 771, 813–14 (1994). "[I]f

need for individuality in the United States has been explained by America's relatively "scattered population," the security from foreign enemies derived from the country's geographically isolated location, and the value placed on individual acts when the American frontier was originally settled.[379] For these reasons, Americans come together only "for specific purposes rather than for general unity."[380] In contrast to America's sense of individuality, France has more of a "prevailing social-democratic political ideology"[381] that emphasizes "social cohesion" over individual expression.[382] Though the social structure in France favors a group dynamic—as opposed to the individuality favored in the United States—young Americans must still realize the benefits of acting together through a unified voice if they want their opinions heard.

The American youths' inability to find a collective voice is further demonstrated by its lack of representation at the voting booth. For example, during the last presidential election in 2004, almost 52% of eighteen to twenty-four year olds voted, compared with the national average of approximately 60%.[383] This number of younger voters was actually dramatically higher than during the 2000 presidential elections, when only 42% of youth voted.[384] Some maintain that this low turnout "reveals significant apathy" among youth "with [America's] current political system."[385] It may indeed be that "many young people do not feel that their viewpoints are considered, let alone adequately represented."[386] Regardless, by failing to assure that their voice is heard on a national level, young Americans subject themselves to the legislative agenda of older generations.[387] And while wisdom often comes with age, younger

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one were limited to a single word with which to characterize America, one would choose the word 'individualism.'" RALPH BARTON PERRY, CHARACTERISTICALLY AMERICAN 8 (1949).

379. Apfel, *supra* note 378, at 814.

380. *Id.*

381. INT'L LABOR LAW COMM., *supra* note 32; *see also* Vivant, *supra* note 35, at 9 ("France has developed an abundant and complex set of laws for the protection of the employee, making France the 'social laboratory' of Europe.").

382. *See* Patrick R. Hugg, *Transnational Convergence: European Union and American Federalism*, 32 CORNELL INT'L L.J. 43, 51–52 (1998) (discussing the role of community and "social cohesion" in the European Union).

383. Elizabeth Aloi, Note, *Thirty-Five Years After the 26th Amendment and Still Disenfranchised: Current Controversies in Student Voting*, 18 NAT'L BLACK L.J. 283, 283 (2005).

384. *Id.*

385. Sean T. McLaughlin, Note, *Pledge Our Grievance to the Flag: Could McCain-Feingold Also Help Bring Young People Back to Politics?*, 27 J. LEGIS. 493, 496 (2001).

386. *Id.*

387. *See id.* at 493–500 (discussing how lack of resources among youth results in campaigns that do not address the interests of this voting bloc).

Americans cannot be certain that their rights are being adequately protected by older Americans without representation of their own.

C. No History of Successful Protests

France has a long history of successful protests in its country. The French propensity towards conflict may be the result of the historical development of the country, where industrialization progressed very slowly.[388] Interestingly, where in the United States union participants consider their colleagues to be "members," in France unionists refer to one another as "comrades"—derived from Latin meaning "soldier."[389] French workers have often resisted "consensus" and have "tended to put conflict before co-operation."[390] As discussed earlier, each generation of French youth has seen its share of protests over the relevant issues of the day.[391] Seemingly without fail, the French government has backed down in each instance.[392] This has served only to encourage further protesting by the French youth.

In the recent history of the United States, however, there is simply no similar pattern of youth protests—whether successful or unsuccessful. This is true, even though as Chief Justice Earl Warren once correctly observed, the United States was "born in protest."[393] One would likely have to go back to the Civil Rights era or the Vietnam War to find examples of student protests on a national level that effectuated any significant change in U.S. policy.[394] Indeed, the Civil Rights movement of the 1960s saw the rise of the Student Nonviolent Coordinating Committee, a student group that "began the interracial brigades of non-violent civil rights workers that

388. DICKSON, *supra* note 32, at 189.

389. *Id.*

390. *Id.*

391. *See supra* text accompanying notes 139–48 (discussing various protests engaged in by French youth over the years).

392. *See supra* text accompanying notes 139–48 (discussing response of government to the protests of French youth).

393. Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 GA. L. REV. 65, 97 (1998) (internal quotation marks omitted).

394. *See id.* (discussing student war protests); Sheryll D. Cashin, *The Civil Rights Act of 1964 and Coalition Politics*, 49 ST. LOUIS U. L.J. 1029, 1040 (2005) (discussing student involvement in civil rights protests); Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 78 (1990) (discussing "widespread" protests that occurred during the Vietnam war); Robert N. Strassfeld, *The Vietnam War on Trial: The Court-Martial of Dr. Howard B. Levy*, 1994 WIS. L. REV. 839, 847 (1994) ("The first nationwide demonstration against the war, organized by Students for a Democratic Society, drew 25,000 protesters to Washington, D.C., on April 17, 1965. Antiwar teach-ins, beginning at the University of Michigan and spreading to other campuses, also marked that spring.").

organized Freedom Summer and the Freedom rides."[395] And, the well-publicized and influential protests of American youth during Vietnam even found their way before the Supreme Court, which held that the First Amendment to the U.S. Constitution protected the right of students to wear black armbands as a signal of their disapproval of the war.[396] Perhaps the most notable example of American student opposition of that era is also the most tragic—when four individuals were killed and nine others injured in May 1970, at Kent State University during hostile protests of the proposed U.S. invasion of Cambodia—underscoring the inherent dangers involved in violent rioting.[397]

The student activism of the 1960s and early 1970s has waned in recent years, and there are no notable examples of nationwide protest on the part of American youth in the past two decades that resulted in any significant change in governmental policies. Through the passage of time, then, younger Americans have become more ambivalent towards governmental action and have not cultivated a tradition of conflict similar to their French counterparts. The effect of this passivity is two-fold: (1) younger Americans have not witnessed their predecessors engage in any collective opposition, and the younger generation is therefore not emboldened to act in protest; and (2) the government is not as afraid to pursue policies that might negatively impact upon younger individuals, as the government knows that this group does not have the political clout to oppose its actions.

There is no ready explanation for the decline in student protests that were so clearly visible during past American generations. Perhaps there have been no significant events in recent years warranting the intervention of young Americans. It may instead be that the unfortunate events at Kent State University created a sense of fear in younger Americans, that has persisted to this day, to protest any governmental action. Or, perhaps there is a sense of apathy generated by the belief of young Americans that their

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395. Cashin, *supra* note 394, at 1040; *see also* STEPHEN B. OATES, LET THE TRUMPET SOUND: THE LIFE OF MARIN LUTHER KING, JR. 155 (1982) ("[T]he Student Nonviolent Coordinating Committee . . . [was designed] to orchestrate the sit-ins and mobilize students across America to combat segregation through nonviolent protest.").

396. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

397. *See* Julie A. Brenizer Klosterman, *Tribute to Judge Don J. Young*, 28 U. TOL. L. REV. 355, 362–63 (1997). Students at Kent State protested President Nixon's announcement that the United States would invade Cambodia. *Id.* at 362. The student protests were marked by "mob rule" and looting, and the National Guard was sent to restore order. *Id.* When guardsmen fired shots into the crowd, four persons were killed and nine others wounded. *Id.* at 363; *see also* Gregory D. Keeney, Comment, *Aid to Education, Student Unrest, and Cutoff Legislation: An Overview*, 119 U. PA. L. REV. 1003, 1022 n.88 (1971) (discussing the level of student protests before and after the Kent State incident).

views are not "adequately represented."[398] Regardless of the reason, it is clear that the youth of America do not have the same incentive to oppose governmental action as the youth in France, who routinely witness the government back down to student demands.[399]

VIII. LESSONS FROM FRANCE

Simply because there are differences in the French and American cultures that explain the disparate reactions to legislation and court decisions restricting the rights of younger workers does not mean that American youth cannot learn from the experience of their French counterparts. Knowledge is power, and younger Americans have observed from afar as the youth of France have been able to effectuate change beneficial to their interests by acting through a collective voice. We obviously should *not* condone the hostile and violent behavior engaged in by many French youth to protest legislation and court decisions. And, such aggressive acts are often counterproductive to the attempts of youth to convey their message. However, the ability of young French workers to act through a single collective voice, and to take notice when governmental action threatens their rights, are traits that should be valued by youth in the United States.

Peaceful protesting, active lobbying, union organizing, and increased voting are all viable ways for American youth to protect their interests, both in the employment arena and elsewhere. Though there are many ways for young Americans to protect their rights, one basic principle has proven essential in France and should be adopted in the United States as well—American youth must find a collective voice. And this voice must be heard on a national level.

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398. McLaughlin, *supra* note 385, at 496.

399. *See supra* text accompanying notes 139–48 (discussing student protests in France and governmental reaction). It is also worth noting that the so-called "endowment effect," whereby individuals "tend to value goods more when they own them than when they do not," may play a role in the disparate reactions of French and American youth. James Robert Ward, III, *The Endowment Effect and the Empirical Case for Changing the Default Employment Contract from Termination "At-Will" to "For-Cause" Discharge*, 28 LAW & PSYCHOL. REV. 205, 209 (2004) (quoting Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003)). In this regard, the French youth were stripped of their employment protections by the First Job Contract, while American youth never had those protections to begin with.

IX. CONCLUSION

The reaction of French youth to a recently proposed labor law restricting their employment rights and the French Constitutional Council's decision upholding the law stands in direct contrast to the reaction of American youth to similar legislation and Supreme Court decisions. The disparate reaction can likely be explained by the difference in unemployment rates of the two countries, the ability of French youth to rally quickly around a unified voice, and the history of successful student protests in France which are nonexistent in the United States.

Perhaps youth in France are the "throwaway" or "Kleenex generation." The young workers of that country may have even acted unreasonably in opposing the First Job Contract—which was designed for their benefit. The one certain thing, however, is that French youth will not sit idly by while their employment protections are taken away. There is definitely a propensity of the French youth to go too far in protesting governmental action, and violent acts and unlawful resistance are never the answer when opposing legislation. Americans, however, should take note of the ability of French youth to be cognizant of relevant legislation and court decisions, as well as the French capacity to quickly organize in opposition to governmental action that they perceive to have a negative impact on their rights. As Thomas Jefferson observed, "[t]he Spirit of Resistance to Government is so valuable on certain occasions that I wish it to be always kept alive."[400] The alternative to finding its collective voice is that American youth will continue to watch as their employment protections are gradually eroded. This truly is the price of American ambivalence.

400. David C. Williams, *The Militia Movement and Second Amendment Revolution: Conjuring with the People*, 81 CORNELL L. REV. 879, 895 (1996) (citation omitted).

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